* Together with No. 35, Kansas City, Missouri, v. L. Singer & Sons et al.

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 34

L. SINGER & SONS ET AL., PETITIONERS,

vs.

UNION PACIFIC RAILROAD COMPANY

No. 35

KANSAS CITY, MISSOURI, PETITIONER,

vs.

L. SINGER & SONS ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONS FOR CERTIORARI FILED MARCH 19, 1940.

CERTIORARI GRANTED APRIL 22, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 34

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[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI

No. 125

L. Singer & Sons, a Corporation; Wm. F. Helm, Doing Business as Wm. F. Helm Produce Company; Arthur Harris, Doing Business as Kansas City Fruit & Produce Company, Robert T. Kesting, Doing Business as H. Kesting Produce Company; Chester F. Urban, Doing Business as Maguire-Urban Commission Company; Fara D'Angelo, Doing Business as D'Angelo Celery House; [fol. 2] R. E. Mills, Doing Business as Mills Produce Company; H. R. Raker, Doing Business as Raker Produce Company; Ralph Hurst; Ralph Hurst & Company, a Corporation; Reuben Kaplan, Doing Business as Royal Food Stores; Earl J. Tranin; Merchants Bank Building & Investment Company, a Corporation, and North Side Business & Improvement Association, a Pro Forma Decree Corporation, Plaintiffs,

vs.

Union Pacific Railroad Company, a Corporation, Defendant

Complaint—Filed December 30, 1938

1. The action arises under the Act of February 4, 1887, 24 Stat. 379, entitled "An Act to Regulate Commerce," as amended by the so-called Transportation Act of February 28, 1920, 41 Stat. 456, U. S. C. Title 49, Section 1, paragraphs 18 to 21, inclusive, as hereinafter more fully appears.

2. Plaintiffs are engaged in the business of buying and selling at wholesale and retail, fruits, vegetables and other food products within and adjacent to the so-called City Market of Kansas City, Missouri, located at and near the intersection of Fourth and Walnut Streets in said City, or are directly interested in or connected with said busi-

ness. Said market has been in existence at said location for more than seventy-five years serving greater Kansas City and vicinity as a wholesale and retail produce market, and also serving numerous territories in other states to and from which perishable and other produce bought and sold in said market is transported. The City of Kansas City, Missouri, is now engaged in the construction of new wholesale and retail market buildings and facilities in said vicinity at a cost of approximately $500,000.00. Said market is now and for a long period of time has been served by existing transportation facilities of various trunk line railroads, and said existing transportation facilities are suitable, convenient and adequate to meet the requirements of the market. The market is easily accessible to its customers through the facilities of said railroads and also by the use of streets and hard-surfaced highways radiating in every direction therefrom.

3. The defendant is now and was at all the times herein mentioned engaged in the business of transportation of pas- [fol. 3] sengers and property by rail between the city of Kansas City, Kansas, and points in other states, as a common carrier and is subject to the provisions of the Interstate Commerce Act as amended.

4. The defendant and the City of Kansas City, Kansas, propose to build and are now engaged in building a so-called "Food Terminal" or produce market on a tract of land owned by said City at or near the confluence of the Kansas (Kaw) and Missouri Rivers, to cost approximately $4,000,000.00, and designed to accommodate a large number of produce dealers. The money for said purpose has been obtained or will be obtained by (1) a grant from the Public Works Administration of $1,710,000.00, and (2) through defendants purchase of 4% Revenue Bonds of the par value of $3,000,000.00 issued by the City of Kansas City, Kansas.

5. Within the last sixty days the defendant has entered into contracts with the City of Kansas City, Kansas, whereby,

(a) defendant purchased from said City $3,000,000.00 par value of the aforesaid Revenue Bonds;

(b) defendant leased from said City at an annual rental of $10,760.00 a year for a period of thirty years a tract

of land containing an area of approximately twenty-five (25) acres, adjacent to said proposed produce market and upon which said tract of land defendant has declared its purpose and intention of building thereon numerous railway tracks and other facilities costing approximately $500,000.00; that the defendant is now engaged in building the main leads from which such tracks will be built.

(c) defendant also agreed, and has declared its purpose and intention, to construct and operate, or to construct, or to operate, a track or tracks to serve said new produce market. Interstate shipments to and from said proposed new produce market will be handled by the defendant over said track or tracks.

6. The said tracks, agreed and proposed to be built and operated, or built or operated by the defendant, constitute an extension or extensions of its line or lines of railway within the provisions of the Interstate Commerce Act, as [fol. 4] amended, and particularly Section 1, paragraphs 18 to 21, inclusive, thereof, U. S. C. Title 49, Section 1, paragraphs 18 to 21, inclusive.

7. Defendant has not obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation, or construction and operation of such extension or extensions of said lines as required by the provisions of said Act cited in the next preceding paragraph of this Complaint.

8. The construction and operation, or the construction, or the operation of the aforesaid extension or extensions of railroad by the defendant to said produce market in Kansas City, Kansas, will

(a) destroy or seriously and adversely affect the businesses and properties of plaintiffs and others and the large investments of money which the plaintiffs, and others have made in and adjacent to the Kansas City, Missouri, produce market;

(b) create a rival market on a barren sandy tract of land dedicated as a public levee to be used in connection with water transportation at a location far removed from the center of population of this community and incon-

venient to a great majority of the citizens of greater Kansas City;

(c) create a rival market without producing additional produce to be handled therein, or additional consumers to be served thereby, when the present Kansas City, Missouri, market has adequate facilities for and is capable of serving this entire community;

(d) result in an unnecessary duplication of railroad facilities at a cost of more than $500,000.00 without increasing the freight to be handled;

(e) divert traffic to the defendant from other railroad companies which have adequate facilities and are now handling the traffic to the Kansas City, Missouri, produce market;

(f) cause destructive competition between the defendant and other railroad companies operating in this vicinity;

[fol. 5] (g) result in wasteful and needless expenditure of money by the defendant.

For each and all of the reasons aforesaid, the construction and operation, or the construction, or the operation of the said extension or extensions of railroad by the defendant to said proposed produce market in Kansas City, Kansas, will directly and adversely affect the property interests of the plaintiffs and the public generally by bringing about a material change in the transportation situation, and will constitute an unnecessary burden upon interstate commerce directly and adversely affecting the welfare of plaintiffs and the public interest.

9. Defendant will, unless enjoined by this court, construct and operate, or construct, or operate, said extension or extensions of its lines without making application for and obtaining from the Interstate Commerce Commission the said certificate of public convenience and necessity.

Wherefore, plaintiffs demand that defendant be restrained and enjoined from constructing and operating said extension or extensions of its lines of railroad into and about the food terminal or market proposed to be erected by the City of Kansas City, Kansas, until such time as defendant has applied for and obtained from the Interstate Com-

merce Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation, or construction and operation of such extension or extensions of said lines, and that plaintiffs have such other and further relief as is just.

Ruby D. Garrett, 822 Scarritt Bldg., Kansas City, Mo.; Fred Ruark, 822 Scarritt Bldg., Kansas City, Mo., Attorneys for Plaintiffs.

IN UNITED STATES DISTRICT COURT

MOTION OF KANSAS CITY, MISSOURI, FOR LEAVE TO INTERVENE AS A PLAINTIFF—Filed January 14, 1939

Comes now Kansas City, Missouri, a municipal corporation, a constitutionally chartered city organized and exist- [fol. 6] ing under and pursuant to Section 16, of Article 9, of the Constitution of Missouri of 1875, as amended, and moves for leave to intervene as a plaintiff in this action, in order to assert its claims and rights to relief set forth in its proposed intervening petition, of which a copy is hereto attached, upon the following grounds and for the following reasons:

1. The action arises under the Act of February 4, 1887, 24 Stat. 379, entitled, "An Act To Regulate Commerce" as amended by the Interstate Commerce Act February 28, 1920, c. 91, paragraph 441, U. S. C. A. title 49, Section 1, paragraphs 18 to 21 inclusive and seeks to enjoin the defendant from constructing and operating a certain extension or extensions of its line of railroad thereto and about a projected food terminal or market proposed to be erected by the city of Kansas City, Kansas until such time as the defendant has applied for and obtained from the Interstate Commerce Commission a certificate of convenience and necessity for the construction and operation of such extension or extensions as provided for by Section 1 (18), of said Interstate Commerce Act.

2. It is the contention of this applicant that the following statutes of the United States confer upon it an unconditional right to intervene, to-wit, Section 1, paragraph 20, of said Interstate Commerce Act, which provides that any construction, operation or abandonment contrary to the

provisions of such paragraph or paragraphs 18 or 19 of said Section 1, of said Act, may be enjoined by any court of competent jurisdiction at the suit of any party in interest. Such interest is hereinafter set forth in paragraphs 5 (a) to 5 (h) of this motion. Such section would, therefore, give Kansas City the right to institute a suit such as the pending one and therefore by necessary implication would confer the unconditional right of intervention herein.

The Judicial Code, Sections 212, 213 Amended (Title 28 U. S. C. A. Sec. 45a) provides that communities who are interested in a controversy or question before the Interstate Commerce Commission or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Com-
[fol. 7] mission, may intervene in said suit or proceeding at any time after the institution thereof. This section, by necessary implication, confers upon applicant the right to intervene as of right because the pending action is one to compel defendant to proceed before said Interstate Commerce Commission to obtain the necessary authority for said proposed construction which if and when done would confer upon applicant the right to intervene before said Commission upon a mere showing of interest in such pending controversy or question before such Commission. The statement of such interest is hereinafter set forth in paragraphs 5 (a) to 5 (h) of this motion.

3. This applicant also asserts a right to intervene as a matter of right because the representation of the applicant's interest by existing parties plaintiff is, or may be, inadequate and the applicant is, or may be bound by judgment in this action. The reasons for which are hereinafter set forth in paragraphs 5 (a) to 5 (h) of this motion.

4. Should the court determine that this applicant may not intervene as of right, Kansas City claims the right of permissive intervention herein for the following reasons:

The aforesaid statutes cited to the court in paragraph 2 hereof, if they do not confer an unconditional right to intervene herein, do by their express terms and by necessary implication, confer a conditional right to intervene here, because applicant claims and the main action have a question of law or fact in common. The intervention, if granted by the court, will not unduly delay or prejudice

the adjudication of rights of the original parties hereto. The reasons for such permissive intervention, in the event applicant has no intervention of right, are set forth in paragraphs 5 (a) to 5 (h) of this motion.

5. The grounds for applicant's intervention of right or for permissive intervention are as follows:

(a) Subsequent to the institution of this suit and on January 9, 1939, a petition was filed with the City Manager of Kansas City, by forty-one produce merchants, property owners and business men of Kansas City, Missouri requesting that Kansas City intervene in this suit and that pursuant to said petition there was introduced in the Council [fol. 8] of Kansas City, on January 9, 1939, a resolution, a certified copy of which is hereto attached and marked exhibit "A", authorizing Kansas City to intervene in said suit and directing the City Manager to have the City Council of Kansas City file such pleadings as may be necessary for said city to intervene herein, which said resolution was duly passed by unanimous vote of the Council of said city on January 9, 1939.

(b) On May 26, 1931, pursuant to a bond election duly authorized, the people of Kansas City voted one-half million dollars in bonds to be used in the construction of a new wholesale and retail market in Kansas City, Missouri, which said new market is now under construction by applicant.

(c) For seventy-five years, there has been built up in Kansas City, Missouri a large volume of business and a great number of merchants engaged in buying and selling at wholesale and retail fruits, vegetables and other food products in and around the City Market center in Kansas City, Missouri, located between 3rd and 5th Streets and Main Street and Grand Avenue; that as a complement to such business, there are a great number of firms in said city engaged in businesses connected with and bearing a direct relation to the business of said wholesale and retail produce merchants and dependent upon the business of said merchants. As a result thereof, said wholesale and retail produce merchants and the firms and organizations connected therewith and dependent thereon have invested in real estate, buildings, improvements and equipment in and about said Market Center, many millions of dollars. Said Market Center is now and has been equipped for

many years with more than adequate railroad and transportation service, storage facilities, loading docks, team tracks and other appurtenances necessary to a marketing center for a large urban population. Said markets and the facilities connected with their said businesses are fully equipped and able and have been serving numerous adjacent territories to Kansas City in the State of Missouri and in other states of the United States. Said Market Center is [assessible] to all portions of the surrounding territory and the territory in other states by complete system of hard [fol. 9] surface roads and steam and electric transportation. In the last few years, the aforesaid facilities have been more than adequate to supply the demand and such will be the case for years to come.

(d) The proposed plan and scheme of defendant is to promote the erection of said competing market center in Kansas City, Kansas and to build the necessary extension of its lines to serve the same wherein and whereby it will be enabled to control the operation thereof and divert revenues from Kansas City, Missouri and from the persons engaged in said wholesale and retail produce business and its complementary industries and that thereby there will accrue to it a large amount of freight and other revenue which will be diverted from the territory in Kansas City, Missouri which has built up and developed such business for the past seventy-five years.

(e) That the aforesaid firms, corporations and individuals engaged in the wholesale and retail produce business and the corporations individually and firms engaged in the complementary industries thereto in each and every year pay to Kansas City large amounts in real estate, personal and occupation taxes and licenses and if defendant is permitted to proceed with the promotion of said market and construction of said tracks without first obtaining a certificate of convenience and necessity from the Interstate Commerce Commission, as provided by law, that Kansas City, Missouri will be in danger of losing a great amount of revenue from the payment of such taxes caused by the depreciation of the property, of its tax paying citizens as aforesaid, and due to the fact that many of the same will remove from Kansas City and carry on their business in said competing Market Center.

(f) All the aforesaid reasons constitute questions of law and fact in common with applicant's claim and the cause of action set forth in the plaintiffs' petition.

(g) The representation of the applicant's interest by the plaintiffs for the foregoing reasons is inadequate and as to the right of defendant to construct said railroad extensions, the judgment in this action would be binding upon applicants, there being no public or quasi public body with any interest in the subject matter which could adequately represent Kansas City, Missouri as a party to this suit.

[fol. 10] (h) That the foregoing statements of fact clearly show the need of the city of Kansas City, Missouri to intervene to protect the public interests of its residents and in order that the process of this court shall not unduly prejudice their interest.

6. For the purpose of alleging federal jurisdictional requirements if the same be necessary for the purpose of this motion, this applicant states; that Kansas City is a municipal corporation having its domicile in the Western Division of the Western District of Missouri and is a citizen of the State of Missouri, and that the defendant is a corporation not a resident of the State of Missouri, but organized under the laws of the United States, and that the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00 and that Kansas City as a plaintiff in the suit in which intervention is sought, would as plaintiff intervene on its own behalf and on behalf of all other citizens and taxpayers of Kansas City, Missouri, having a common and general interest in this proceeding, who are so numerous as to make it impracticable to bring them all before the court.

Wherefore, for the foregoing reasons, Kansas City, Missouri moves for leave to intervene, as aforesaid, as plaintiff herein.

Fred Bellemere, City Counselor. Marcy K. Brown, Jr., Assistant City Counselor, Attorneys for Kansas City, Missouri, Applicant for Intervention, Address: 2800 City Hall, Kansas City, Missouri.

EXHIBIT "A" TO MOTION

Resolution

Whereas, a suit has been filed in the United States District Court for the Western Division of the Western Dis-

trict, at Kansas City, Docket No. 125, by forty-one business men and corporations against the Union Pacific Railroad [fol. 11] Company seeking to enjoin that railroad from constructing and operating an extension of its line into a proposed Food Terminal in Kansas City, Kansas until it has secured a certificate of convenience and necessity from the Interstate Commerce Commission, as required by law; and

Whereas, a wholesale and retail market has been in existence in Kansas City, Missouri, for more than eighty years, adequately serving the needs of this community and its trade territory; and

Whereas, the citizens of Kansas City, Missouri, voted one-half million dollars in bonds to be used in the construction of a new wholesale and retail market in Kansas City, and that new market is now under construction; and

Whereas, the proposed produce food terminal in Kansas City, Kansas, would merely divide the present market business, without increasing the number of consumers or the amount of shipments to or from Greater Kansas City or its trade territory would greatly decrease property values and would be a wasteful duplication of existing market facilities and those now being constructed in Kansas City, Missouri, out of the bonds voted as aforesaid; and

Whereas, forty-one business men and corporations have petitioned Kansas City, Missouri, to intervene in the suit heretofore filed to enjoin the construction and operation of said extension track by the Union Pacific Railroad Company,

Now, Therefore, Be It Resolved by the Council of Kansas City, Missouri, that the city of Kansas City should intervene in said suit and that the City Manager be and hereby is directed to have the City Counselor of Kansas City, draw up and file such pleadings as may be necessary for the City of Kansas City to intervene in said suit.

Authenticated as passed this Jan. 9, 1939.

Bryce B. Smith, Mayor. Chas. W. Regan, City Clerk, by Wm. Dalton, Deputy. (Seal.)

[fol. 12] State of Missouri,
County of Jackson,
Kansas City, ss:

I, Chas. W. Regan City Clerk of Kansas City, Missouri, hereby certify that the annexed and foregoing is a true and correct copy of a Resolution of said City, No. 5176

Authenticated as passed this 9th day of January, 1939, as the same appears of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of Kansas City aforesaid, this 14th day of January, 1939.

Chas. W. Regan, City Clerk, by M. Hook, Deputy.
(Seal.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENING PETITION OF KANSAS CITY, MISSOURI—Filed January 14, 1939

[fol. 13] 1. Comes now Kansas City, Missouri a municipal corporation and states that it is a municipal corporation having its domicile in the Western Division of the Western District of Missouri and is a citizen of the State of Missouri; that it is a municipal corporation with a constitutional charter organized and existing under and pursuant to Section 16, of Article 9, of the Constitution of Missouri of 1875, as amended.

2. That defendant Union Pacific Railroad Company is a corporation, organized by an Act of Congress on July 1, 1862, c 120, 12 Stat. 489, as amended, and is now and was at all times herein engaged in the business of transportation of passengers and property by rail between the city of Kansas City, Kansas and points in other states, as a common carrier, and is subject to the provisions of the Interstate Commerce Act.

3. This action arises under the act of February 4, 1887, 24 Stat. 379, entitled, "An Act To Regulate Commerce" as amended by the Interstate Commerce Act of February 28, 1920, 41 Stat. 456, U. S. C. A. title 49, Section 1, paragraphs 18 to 21 inclusive, as more fully is set out hereinafter. The plaintiffs herein, with the exception of Kansas City, Missouri, are persons, firms and corporations engaged in the business of buying and selling at wholesale and retail, fruits, vegetables and other food products within and adjacent to the City Market of Kansas City, Missouri, located between 3rd and 5th Streets and Main Street and Grand

Avenue in said city, or are directly interested in or connected with said businesses.

4. For seventy-five years, there has been built up in Kansas City, Missouri, a large volume of business and a great number of merchants engaged in buying and selling at wholesale and retail fruits, vegetables and other food products of every kind and character in and around said City Market, including the plaintiffs and many other firms, persons and corporations; there are also a great number of corporations, firms and individuals in said city engaged in businesses connected with and bearing a direct relation to the business of said wholesale and retail produce merchants and dependent upon the business of said merchants; that all of said wholesale and retail produce merchants and all [fol. 14] of said persons, firms and corporations engaged in other businesses serving said wholesale and retail produce merchants, as aforesaid, are citizens and residents of Kansas City, Missouri, and taxpayers in said city. These said merchant- have, over a period of seventy-five years, built up and developed a large body of business for the purpose of serving not only Kansas City, Missouri but Kansas City, Kansas and urban centers adjacent to both cities and also serving numerous territories in the states of Missouri and Kansas and in other states. To said market and the merchants aforesaid, are shipped an immense volume of food products of all kinds and character from every center in the United States producing such food products and the said products are distributed by said merchants in said territory in Missouri and Kansas and many other states, all of said transactions constituting trade in Interstate Commerce. Said wholesale and retail produce merchants and the firms and organizations connected therewith and dependent thereon have invested many millions of dollars in real estate, buildings, improvements and equipment in and about said City Market and its appurtenances is now and has been equipped for many years with more than adequate railroad and transportation service, storage facilities, loading docks, team tracks and other appurtenances necessary to a marketing center for a large urban population. Said market is now, and has been for many years, easily [assessible] to all portions of the surrounding territory and to other states, by a complete and adequate system of hard-surface roads and steam and electric transporta-

tion. In the last few years, such marketing facilities have been more than adequate to supply the demand and such will be the case for many years to come.

5. The defendant and the city of Kansas City, Kansas have proposed to build and are now engaged in the building of a "food terminal" or produce market, on a tract of land owned by Kansas City, Kansas, at or near the junction of the Kansas and Missouri rivers and it is publicly stated that the cost of the same will be approximately $4,000,000.00, and that it will be designed to accommodate a large number of produce dealers. The money for said project has been obtained or will be obtained by a grant from the Public Works Administration of PWA, $1,710,-[fol. 15] 000.00, and through defendant's purchase of certain Revenue Bonds, issued by Kansas City, Kansas, of the par value of $3,000,000.00, bearing four per cent interest.

6. Within the last sixty days, defendant has entered into a contract with the city of Kansas City, Kansas, whereby—

(a) Defendant purchased from said city $3,000,000.00 par value of the aforesaid Revenue Bonds;

(b) Defendant leased from said city, at an annual rental of $10,760.00, for a term of thirty years, a tract of land containing an area of approximately twenty-five acres, adjacent to said proposed produce market, and upon which said tract of land defendant has declared its purpose and intention of building thereon numerous railroad tracks and other facilities costing approximately $500,000.00, and that defendant is now engaged in constructing the main leads from which such tracks will be built;

(c) Defendant also agreed, and has declared, its purpose and intention, to construct and operate, or to construct, or to operate, tracks to serve said new produce market, and has announced that shipments in Interstate Commerce to and from said proposed new produce market will be handled by defendant over said track or tracks which it is now engaged in constructing.

7. Plaintiff states that it is provided by the terms of Section 1, Paragraph 18, of the Interstate Commerce Act, U. S. C. A. Title 49, Section 1, Paragraph 18, that no carrier by railroad, subject to this chapter, shall undertake the extension of its line of railroad, or the construction

of a new line of railroad, or shall acquire or operate any line of railroad or extension thereof, or shall engage in transportation under this chapter, over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require, or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad.

8. The said tracks, agreed and proposed to be built and operated, or built or operated by the defendant, constitute [fol. 16] an extension or extensions of its line or lines of railway within the provisions of said Paragraph 18, of said Interstate Commerce Act, as amended, for the following reasons:

(a) Said tracks and extensions when constructed will be used and operated in Interstate Commerce and as a final destination and as a transfer point for rerouting to other states of defendant's railroad lines and other railroads and other forms of transportation, carload lots of produce and food products, and that defendant, as a part and parcel of said business, will necessarily have arrangements with other railroads for interchange of traffic and will participate in division of rates beyond its own road should the commodity shipped into said food terminal be carried further by some other railroad and will necessarily be a party to through billing on shipments both incoming and outgoing; that defendant will also operate its said track extensions at said food terminal as a clearing house for routing and re-routing of carload lots of produce and food products shipped to said point on its own road, and that said new extensions will function as a carrier of freight passing in continuous journey from the point of origin on defendant's line inside and outside of the state of Kansas to destinations beyond the state of Kansas. Plaintiff states that the charges for such service will be based upon the appropriate rates for through interstate movement of freight;

(b) Said extensions will create and be used in competition between defendant and other railroads now existing as parallel and competing lines. There now exists in Kansas City, Missouri the lines of many other railroads which now

and in the past have for a great number of years enjoyed the revenues accruing from the business built up by said produce merchants and other independent agents to the Kansas City, Missouri market and the facilities of said railroads for the handling of said freight are amply adequate and efficient. If defendant be allowed to complete and operate said extensions, without first obtaining said certificate of convenience and necessity from the Interstate Commerce Commission, the operation and use of said extensions will divert a large volume of freight revenue from said other railroads already serving this territory to the consequent injury of both defendant and said other railroads and of the public and will constitute the building of [fol. 17] a duplicate line of railroad which will depend for traffic revenue upon such income which defendant may divert from railroads already built which can only add to the total burden of maintenance and capital returns, which the public generally will be forced to pay.

(c) The use and operation of said extensions will seriously interfere with the use and operation of the lines of track, team tracks, loading docks and other appurtenances used by the railroads which have served Greater Kansas City and surrounding territory which are at the present time entirely adequate for all movements of freight to, through and from Kansas City, Missouri and Kansas City, Kansas.

9. The unauthorized construction and operation, or the construction or the operation, of the aforesaid extension or extensions of railroad by the defendant to said produce market in Kansas City, Kansas will seriously threaten and directly and adversely affect the welfare of all plaintiffs herein by bringing about a material change in the transportation situation in Kansas City, Missouri and will be deleterious to the public interest in securing and maintaining proper railroad service without undue loss in the following respects:

(a) It will destroy or seriously and adversely affect the businesses and properties of plaintiffs and others and the large investments of money which the plaintiffs and others have made in and adjacent to the Kansas City, Missouri produce market;

(b) It will create a rival market on a barren sandy tract of land dedicated as a public levee to be used in connection with water transportation at a location far removed from the center of population of this community and inconvenient to a great majority of the citizens of greater Kansas City;

(c) It will create a rival market without producing additional produce to be handled therein, or additional consumers to be served thereby, when the present Kansas City, Missouri, market has adequate facilities for and is capable of serving this entire community;

[fol. 18] (d) It will result in an unnecessary duplication of railroad facilities at a cost of more than $500,000.00 without increasing the freight to be handled;

(e) It will divert traffic to the defendant from other railroad companies which have adequate facilities and are now handling the traffic to the Kansas City, Missouri produce market;

(f) It will cause destructive competition between the defendant and other railroad companies operating in this vicinity;

(g) It will result in wasteful and needless expenditure of money by the defendant.

(h) That the aforesaid firms, corporations and individuals engaged in the wholesale and retail produce business and the corporations individually and firms engaged in the complementary industries thereto in each and every year pay to Kansas City large amounts in real estate, personal and occupation taxes and licenses and if defendant is permitted to proceed with the promotion of said market and construction of said tracks without first obtaining a certificate of convenience and necessity from the Interstate Commerce Commission, as provided by law, that Kansas City, Missouri will be in danger of losing a great amount of revenue from the payment of such taxes caused by the depreciation of the property, of its taxpaying citizens as aforesaid, and due to the fact that many of the same will remove from Kansas City and carry on their business in said competing Market Center.

(i) There are approximately seventy wholesale produce dealers in Greater Kansas City, not one of which is located in Kansas City, Kansas, the entire industry being located

in said City Market Center of Kansas City, Missouri. On May 26, 1931, pursuant to a bond election, duly authorized, the people of Kansas City, Missouri, voted one-half million dollars in bonds to be used in the construction of a new wholesale and retail market in Kansas City, Missouri, and at the present time there is being constructed in Kansas City, Missouri a large regional terminal produce market out of said bond funds, the entire ground upon which said market is being constructed having been owned by Kansas [fol. 19] City, Missouri since the incorporation of the city and part of which was deeded to the city with the express provision that it must be operated as a farmers and public market. If defendant is permitted to construct said track extensions, without first having the public convenience and necessity thereof determined according to law, it will result in Kansas City a duplication of produce terminals and a split market condition which only result in useless expenditure and waste of capital by defendant which can only be recouped by increased freight rates to the detriment of the public.

10. Plaintiff states that defendant has not applied to or obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and public necessity require, or will require, the construction or operation, or construction and operation of such extension or extensions of said lines as required by the provisions of Section 1, Paragraph 18, of said Interstate Commerce Act cited herein.

11. Defendant will, unless enjoined by this court, construct and operate, or construct, or operate said extension or extensions of its lines without making application for and obtaining from the Interstate Commerce Commission the said certificate of public convenience and necessity.

12. Neither the Interstate Commerce Commission nor any Commission or relating board of the state of Kansas or the state of Missouri has instituted any proceeding to compel the relief sought in this action and Kansas City, Missouri being a party in interest for the aforesaid reasons, brings this action pursuant to Section 1, Paragraph 20, of said Interstate Commerce Act, 49 U. S. C. A., Section 1, (20). Plaintiff further states that the amount in controversy herein exceed, exclusive of interest and costs, the

sum of $3,000.00, and that Kansas City is a plaintiff in this suit acts on its own behalf and on behalf of all other citizens and taxpayers of Kansas City, Missouri and other wholesale and retail produce merchants not parties hereto, who all have a common and general interest in this proceeding but who are so numerous as to make it impracticable to bring before the court as parties hereto.

[fol. 20] Wherefore, plaintiff demands that defendant be restrained and enjoined from constructing and operating said extension or extensions of its lines of railroad into and about the food terminal or market proposed to be erected by the city of Kansas City, Kansas, until such time as defendant has applied for and obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require, or will require the construction or operation, or construction and operation of such extension or extensions of said lines and that plaintiff have such other and further relief as is just.

Fred Bellemere, City Counselor, Marcy K. Brown, Jr., Assistant City Counselor, Attorneys for Plaintiff, Kansas City, Missouri, 2800 City Hall Building, Kansas City, Missouri.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed January 18, 1939

Comes Now the defendant and for its answer to the complaint filed herein alleges and states:

First Defense

That the Court has no jurisdiction over the subject matter of the purported action averted in the complaint.

Second Defense

Defendant alleges that the plaintiffs are not nor are any of them parties in interest under the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A., Section 1, Par. 20) and that said par-

ties are not nor are any of them authorized to institute or maintain any action thereunder.

Third Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

[fol. 21] Fourth Defense

(a) Defendant denies all and singular the allegations of paragraph numbered "1" of the complaint.

(b) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments made in paragraph numbered "2" of the complaint.

(c) Defendant admits the allegations of paragraph numbered "3" of the complaint.

(d) Answering paragraph numbered "4" of said complaint defendant admits that the City of Kansas City, Kansas proposes to build and is now engaged in building a Food Terminal or Produce Market, consisting of wholesale dealers' unit and a farmers' food products market, on a tract of land owned by said City at or near the confluence of the Kansas (Kaw) and Missouri Rivers, to cost approximately $4,000,000.00, but denies that the defendant proposes to build or is now engaged in building said Food Terminal or Produce Market.

Defendant further admits that the City of Kansas City, Kansas has obtained a grant from the Public Works Administration of the United States of $1,710,000.00; that defendant has purchased from said City an issue of $3,000,000.00 principal amount of said City's 4% Public Levee Terminal Revenue Bonds, and that the proceeds of said bonds after providing for the retirement of outstanding Public Levee Revenue Bonds, together with the proceeds of said grant, will be used by said City in the construction of said Food Terminal or Produce Market.

(e) Defendant admits the allegations of subparagraph (a) of paragraph numbered "5" of the complaint.

(f) Defendant admits that it has leased from said City at an annual rental of $10,760.00 per year for a period of thirty years a tract of land containing an area of approximately twenty-five (25) acres, adjacent to said Produce

Market, but denies all and singular the other allegations of said subparagraph (b) of paragraph numbered "5".

Further answering said subparagraph (b) of paragraph numbered "5", defendant states that pursuant to the terms [fol. 22] of said lease defendant proposes to construct on said leased premises for convenient service to said Food Terminal certain team, spur, switching, or side tracks; that as a part of said Food Terminal the City of Kansas City, Kansas will construct industry tracks adjacent to and for the purpose of serving certain of the buildings included in said Food Terminal, which tracks the City of Kansas City, Kansas will connect with said trackage to be constructed by defendant under said lease. Defendant further alleges that pursuant to the provisions of said lease it has agreed to operate the industry tracks to be constructed by the City of Kansas City, Kansas, and that the cost to defendant of constructing said team, spur, switching, or side tracks, including the driveways to permit convenient access to and for loading and unloading cars on said team tracks, to be built by it, will approximate $500,000.00.

(g) Defendant denies all and singular the allegations of subparagraph (c) of paragraph numbered "5", except that it admits that carload shipments, including interstate shipments, when consigned to or from said produce terminal or to or from the team tracks to be constructed by the defendant, will be handled by it in switching movements over said trackage.

(h) Defendant denies all and singular the allegations of paragraph numbered "6" of the complaint.

Further answering said paragraph numbered "6" defendant alleges that the tracks to be constructed by the defendant pursuant to said lease consist of team tracks and switching tracks and a connection between said team and switching tracks and the defendant's existing line of railroad located immediately adjacent to and for many years serving the Public Levee of the City of Kansas City, Kansas and the industrial territory adjacent thereto; that the tracks to be constructed by the City of Kansas City, Kansas, pursuant to said lease, will be industrial or spur tracks connecting with the team tracks of the defendant; and that all of the tracks to be constructed or operated by the defendant pursuant to said lease will be located wholly within one state, to-wit, the State of Kansas; and that said tracks will

not, nor will any of them, constitute an extension or extensions of defendant's line or lines of railroad.

[fol. 23] (i) Answering paragraph numbered "7" of said complaint defendant denies all and singular the allegations therein contained, except that defendant admits that it has not obtained a certificate from the Interstate Commerce Commission that the present or future public convenience and necessity requires or will require the construction or operation or construction and operation of the tracks more particularly described in paragraphs (f) and (h) of the Fourth Defense of this answer, and defendant alleges that the Interstate Commerce Commission by virtue of the provisions of paragraph (22) of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A., Section 1, Par. 22) is without jurisdiction to grant any such certificate.

(j) Defendant denies all and singular the allegations of paragraph numbered "8" of said complaint.

(k) Answering paragraph "9" of the complaint defendant admits that it will construct and operate or operate the tracks more particularly described in paragraphs (f) and (h) of the Fourth Defense of this answer without making application for [an] obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity.

Further answering said paragraph "9" defendant alleges that by virtue of paragraph (22), Section 1, of the Interstate Commerce Act (Title 49 U. S. C. A., Sec. 1, Par. 22) the Interstate Commerce Commission is without authority to grant a certificate of convenience and necessity respecting the construction and operation of said tracks and that the Interstate Commerce Commission is wholly without jurisdiction in the premises.

Further answering said paragraph numbered "9" of the complaint this defendant denies all and singular the allegations thereof not expressly admitted herein.

Wherefore, having fully answered said complaint defendant prays that the complaint be dismissed and that defend-
[fol. 24] ant have and recover of plaintiffs the costs of this action.

T. W. Bockes, 1416 Dodge St., Omaha, Nebraska,
Henry N. Ess, 1500 Dierks, Bldg., Kansas City,
Mo., Attorneys for Defendant.

Service of a copy of the within and foregoing answer is hereby acknowledged this 18th day of January, 1939, by Ruby D. Garrett, the undersigned attorney for plaintiffs.

Ruby D. Garrett, Fred Ruark, Attorneys for Plaintiffs.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

APPLICATION OF DEFENDANT TO HEAR DEFENSES ASSERTED AS FIRST, SECOND, AND THIRD DEFENSE, RESPECTIVELY, IN ITS ANSWER—Filed February 7, 1939

Comes Now the defendant and makes this application to the Court that the Court hear and determine before trial the following defenses raised in its answer, to-wit: First Defense, Second Defense, and Third Defense.

Wherefore, this defendant prays that the Court hear and determine said defenses in advance of the trial.

T. W. Bockes, Henry N. Ess, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 25] IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION OF KANSAS CITY, MISSOURI, FOR LEAVE TO INTERVENE AND DISMISSING COMPLAINT—Filed March 3, 1939

For the reasons appearing in the memorandum opinion attached hereto, the motion of the City of Kansas City, Missouri, for leave to intervene is denied, and it is

Ordered, Adjudged And Decreed that plaintiffs' bill be and is hereby dismissed and the plaintiffs take nothing by reason therefor, and that the defendant be and is discharged with its costs.

J. C. Collet, District Judge.

Dated this 3rd day of March, 1939.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DECREE—Filed March 3, 1939

This cause came on to be heard upon the application of the defendant duly filed, that the First Three Defenses in defendant's answer to the complaint be heard and determined before trial, and upon the motion of Kansas City, Missouri for leave to intervene as a plaintiff herein, and said application and said Defenses being submitted to the Court upon briefs and arguments of plaintiffs and defendant, and said motion for leave to intervene being submitted to the Court on briefs and arguments of the City of Kansas City, Missouri and the defendant. Upon consideration whereof the Court being fully advised in the premises,

It Is By The Court Considered, Ordered, Adjudged And Decreed:

1. That the application of the defendant be and it is hereby sustained.

2. That the Court has jurisdiction of the subject matter and the First Defense is hereby denied.

3. That plaintiffs are not, nor are any of them, parties in interest who may maintain this action; that the complaint fails to state a claim upon which any relief can be granted, and the defendant's Second and Third Defenses be and the same are hereby sustained.

[fol. 26] 4. That the City of Kansas City, Missouri is not a party in interest authorized to maintain or intervene in said action and the motion for leave to intervene of said City be and the same is hereby denied.

5. That the complaint be and the same is hereby dismissed at the costs of the plaintiffs.

Done this 3rd day of March, 1939.

J. C. Collet, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL BY L. SINGER & SONS, ET AL.—Filed March 28, 1939

Notice is hereby given that L. Singer & Sons, a corporation; Wm. F. Helm, doing business as Wm. F. Helm Produce Company; Arthur Harris, doing business as Kansas City Fruit & Produce Company; Robert T. Kesting, doing business as H. Kesting Produce Company; Chester F. Urban, doing business as Maguire-Urban Commission Company; Fara D'Angelo, doing business as D'Angelo Celery House; R. E. Mills, doing business as Mills Produce Company; H. R. Raker, doing business as Raker Produce Company; Ralph Hurst; Ralph Hurst & Company, a corporation; Reuben Kaplan, doing business as Royal Food Stores; Earl J. Tranin; Merchants Bank Building & Investment Company, a corporation, and North Side Business & Improvement Association, a pro forma decree corporation, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Eighth Circuit from that portion of the final decree or judgment entered in this action on March 3, 1939, reading as follows, to-wit:

"1. That the application of the defendant be and it is hereby sustained.

"3. That plaintiffs are not, nor are any of them, parties in interest who may maintain this action; that the complaint fails to state a claim upon which any relief can be granted, and the defendant's Second and Third Defenses be and the same are hereby sustained.

[fol. 27] "5. That the complaint be and the same is hereby dismissed at the costs of the plaintiffs."

Dated this 28th day of March, 1939.

Ruby D. Garrett, 822 Scarritt Bldg., Kansas City, Mo. Fred Ruark, 822 Scarritt Bldg., Kansas City, Mo. Spurgeon L. Smithson, 606 Commerce Building, Kansas City, Mo. Attorneys for above named appellants.

Copy of above notice mailed to Mr. Henry Ess, Attorney for defendant, March 28, 1939.

E. O'Keefe, Deputy Clerk.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL BY KANSAS CITY, MISSOURI—Filed March 31, 1939

Notice is hereby given that Kansas City, Missouri, a municipal corporation, applicant to intervene herein, as a party plaintiff, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from that portion of the final decree or judgment entered in this action on March 3, 1939, reading as follows, to-wit:

"4. That the City of Kansas City, Missouri is not a party in interest authorized to maintain or intervene in said action and the motion for leave to intervene of said City be and the same is hereby denied.

[fols. 28-29] "5. That the complaint be and the same is hereby dismissed at the costs of the plaintiffs".

Dated this 31st day of March, 1939

Fred Bellemere, City Counselor, 2800 City Hall, Kansas City, Mo. Marcy K. Brown, Assistant City Counselor, 2800 City Hall, Kansas City, Mo. Attorneys for Kansas City, Missouri, Applicant.

Received a copy of the foregoing Notice of Appeal this 31st day of March, 1939.

Watson, Ess, Groner, Barnett & Whittaker, Attorneys for Defendant Union Pacific Railroad Co.

Copy of the above notice of appeal mailed to Ruby D. Garrett, Attorney for plaintiffs, and to Watson, Ess, Groner, Barnett & Whittaker, Attorneys for Defendant, on March 31, 1939.

E. O'Keefe, Deputy Clerk.

[File endorsement omitted.]

[fol. 30] IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION—Filed March 3, 1939

Plaintiffs, alleging themselves to be engaged in or directly interested in or connected with, the business of buying and selling at wholesale and retail, fruits, vegetables and other

food products within and adjacent to the City Market of Kansas City, Missouri, seek to restrain the defendant, a railroad company, from constructing certain tracks, characterized in the complaint as "extensions", connecting defendant's present railway lines with a proposed new City Market about to be constructed in Kansas City, Kansas, not far from the present City Market of Kansas City, Missouri, without first obtaining a Certificate of Convenience and Necessity from the Interstate Commerce Commission authorizing the construction of the proposed new tracks. It is alleged that the proposed construction by defendant will destroy plaintiffs' business and investment, create a rural market without producing additional transportation business, result in unnecessary duplication of transportation facilities, unnecessarily divert transportation to defendant from other railroad companies, create destructive competition and result in needless expenditure of monies by defendant. For all of these reasons it is alleged that the property rights of plaintiffs and the general public will be adversely affected, a material change in the transportation situation created, and an unnecessary burden imposed upon interstate commerce.

The City of Kansas City, Missouri, has filed a motion requesting leave to intervene as a party plaintiff upon the ground that it is entitled to jointly maintain this action as a "party in interest" under the Act of February 4, 1887, 24 Stat. 379, entitled "An Act to Regulate Commerce" as amended by the Interstate Commerce Act of February 28, 1920, c. 91, par. 444, U. S. C. A. Title 49, Sec. 1, par. 20, and the Judicial Code Secs. 212, 213 as amended (Title 28 U. S. C. A. Sec. 45a). The motion to intervene alleges movant is actually interested in the subject matter of this proceeding because it has voted one-half million dollars in bonds for the construction of a new City Market now under construction and which will be injuriously affected by the establishment and construction of the new City Market in Kansas City, Kansas, and the construction to it by defendant of the so-called unauthorized railway "extensions". [fol. 31] It is further alleged that defendant's threatened action to construct the unauthorized extensions will divert much business from many old and prosperous businesses located at the Kansas City, Missouri, City Market with great pecuniary loss to those business establishments, loss in real estate values, loss in tax revenues to movant and loss

of convenient accessibility to a City Market by the citizens of Kansas City, Missouri.

The defendant has, by answer, (1) challenged the jurisdiction of this court over the subject matter of the action, (2) challenged plaintiffs' capacity to maintain this action as "parties in interest" under Sec. 1, par. 20, supra, and (3) challenged the sufficiency of the complaint to state a claim against defendant upon which the relief prayed for may be granted. By appropriate motion, defendant requests a ruling on these three above stated defenses in advance of a trial on other issues. Defendant also objects to the granting of leave to the City of Kansas City, Missouri, to intervene upon the ground, among others, that the City is not a "party in interest" within the meaning of Sec. 1, par. 20, supra.

The complaint and motion to intervene disclose that neither plaintiffs, nor the City of Kansas City, Missouri, are engaged in the transportation business. It further appears that neither the property or confines of either are touched, encroached upon or directly affected by the proposed construction of the so-called "extensions". There is no violation of any definite legal right alleged. Therefore, neither plaintiffs nor the City of Kansas City, Missouri, may maintain this action. Western Pacific Cal. R. R. Co. vs. So. Pac. Co., 284 U. S. 47, Texas & Pac. Ry. Co. vs. Gulf, Colo. & S. F. Ry. Co., 270 U. S. 266, Claiborne-Annapolis Ferry vs. U. S., 285 U. S. 382, Texas etc. R. R. Co. vs. Northside Ry. Co., 276 U. S. 469.

Since neither the United States, the Interstate Commerce Commission, the Public Service Commission of Missouri or Kansas, or any party directly interested is a party plaintiff to this action it may not be maintained and must be dis-[fol. 32] missed and the motion to intervene denied. (Sec. 1, par. 20, Title 49, U. S. C. A., supra).

J. C. Collet, District Judge.

Dated this 3rd day of March, 1939.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

STATEMENT OF POINTS ON APPEAL OF L. SINGER & SONS et al. —Filed May 8, 1939

[fol. 33] Come now the above named plaintiffs, appellants, and pursuant to the provisions of Rule 24 of this Honorable Court, file the following statement of points upon which they will rely upon their appeal from the decree of the Honorable District Court of the United States for the Western Division of the Western District of Missouri.

I

The court below erred in sustaining defendant's application to hear and determine before trial the second defense set forth in defendant's answer, reading as follows:

"Defendant alleges that the plaintiffs are not nor are any of them parties in interest under the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A. Section 1, Par. 20) and that said parties are not nor are any of them authorized to institute or maintain any action thereunder.",

for the reason that said second defense is not one of the enumerated defenses which, under paragraphs (b) and (d) of Rule 12 of Rules of Civil Procedure for the District Courts of the United States, may be heard and determined before trial.

II

The court below erred in hearing and determining before trial the second defense set forth in defendant's answer, reading as follows:

[fol. 34] "Defendant alleges that the plaintiffs are not nor are any of them parties in interest under the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A. Section 1, Par. 20) and that said parties are not nor are any of them authorized to institute or maintain any action thereunder.",

for the reason that said second defense is not one of the enumerated defenses which, under paragraphs (b) and (d) of Rule 12 of Rules of Civil Procedure for the District Courts of the United States, may be heard and determined before trial.

III

The court below erred in considering, ordering, adjudging and decreeing that plaintiffs are not, nor are any of them parties in interest who may maintain this action because under the allegations of the Complaint the plaintiffs (appellants) are parties in interest and authorized and entitled to institute and maintain this action under the laws of the United States, and particularly the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A. Sec. 1, Par. 20).

IV

The court below erred in considering, ordering, adjudging and decreeing that the Complaint fails to state a claim upon which any relief can be granted, for the reason that said Complaint states a good cause of action and a claim on which relief can be granted under the laws of the United States and particularly under the provisions of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 1, Paragraphs 18 to 21, inclusive).

V

The court below erred in dismissing plaintiffs' complaint at plaintiffs' costs for the reason that said complaint states a good cause of action and a claim upon which relief can be granted under the laws of the United States and particularly the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 1, Paragraphs 18 to 21, inclusive).

[fol. 35] Wherefore, appellants, jointly and severally, pray that the decree herein may be reversed.

Ruby D. Garrett, 822 Scarritt Bldg., Kansas City, Missouri; Fred Ruark, 822 Scarritt Bldg., Kansas City, Missouri; Spurgeon L. Smithson, 606 Commerce Building, Kansas City, Missouri.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

STATEMENT OF THE POINTS ON WHICH APPELLANT KANSAS CITY, MISSOURI, INTENDS TO RELY AND OF THE PARTS OF THE RECORD WHICH SAID APPELLANT THINKS NECESSARY FOR THE CONSIDERATION THEREOF—Filed May 10, 1939

Comes now Kansas City, Missouri, a Municipal Corporation, Appellant herein and in conformity with Rule 24, of the Court, states that Appellant Kansas City, Missouri, a Municipal Corporation, intends to rely upon the contentions that the District Court of the United States for the Western Division of the Western District of Missouri erred in this cause:

(1) In denying the right of this Appellant to intervene and in denying its motion for leave to intervene on the [fol. 36] ground that the motion to intervene as a plaintiff by Kansas City stated no facts sufficient to justify the relief asked therein because said Kansas City, Missouri, a Municipal Corporation was not a party in interest within the provisions of the Act of February 24, 1887, 24 Stat. 379, entitled, "An Act to Regulate Commerce" as amended by the Interstate Commerce Act of February 28, 1920, 41 Stat. 456, U. S. C. A. entitled "49 Sec. 1, paragraphs 18 to 21 inclusive" because upon the allegations of said motion to intervene as a plaintiff and the intervening petition of Kansas City filed therewith, sufficient allegations are contained therein to state grounds for its requested intervention and to constitute it a party in interest entitled to the relief prayed within the terms of said statutes.

(2) In holding and denying the right of this Appellant to maintain the cause of action set forth in plaintiff's petition and in this Appellant's motion to intervene as a party plaintiff and its intervening petition filed therewith on the ground that Kansas City, Missouri, a Municipal Corporation was not a party in interest within the provisions of the Act of

February 24, 1887, 24 Stat. 379, entitled, "An Act to Regulate Commerce" as amended by the Interstate Commerce Act of February 28, 1920, 41 Stat. 456, U. S. C. A. entitled "49 Sec. 1, paragraphs 18 to 21 inclusive" because upon the allegations of said motion to intervene as a plaintiff and the intervening petition of Kansas City filed therewith, sufficient allegations are contained therein to state grounds for its right to maintain such an action and to constitute it a party in interest entitled to the relief prayed within the terms of said statutes.

(3) In dismissing the Bill of Complaint of plaintiff L. Singer and Sons, a corporation, et al., for the reason that said Bill of Complaint states facts sufficient to constitute a cause of action and to make said plaintiffs parties in interest within the meaning of said hereinbefore quoted statutes.

(4) In the rendition of the final decree in this cause filed and entered March 3, 1939, the Appellant Kansas City, Missouri deems the entire record as filed to be necessary for [fols. 37-40] the consideration of the contentions above enumerated and prays that said order and decree be reversed.

Fred Bellemere, City Counselor; Marcy K. Brown, Jr., Assistant City Counselor, 2800 City Hall, Kansas City, Missouri, Attorneys for Appellant, Kansas City, Missouri.

Service of a copy of the foregoing statement of points is hereby acknowledged on behalf of the Appellee this 8th day of May, 1939.

T. W. Bockes, Henry N. Ess, Attorney for Appellee.

Service of a copy of the foregoing statement of points is hereby acknowledged on behalf of L. Singer & Sons, a corporation, et al., Appellants, this 8th day of May, 1939.

Ruby D. Garrett, Fred Rauk, Spurgeon L. Smithson, Attorneys for Appellants, L. Singer & Sons, et al.

[File endorsement omitted.]

[fol. 41] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11480

L. SINGER & SONS et al., Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY

Appeal from the District Court of the United States for the Western District of Missouri

ORDER OF SUBMISSION—November 7, 1939

This cause having been called for hearing in its regular order, argument was commenced by Mr. Ruby D. Garrett for appellants, continued by Mr. Henry N. Ess for appellee, [fol. 42] and concluded by Mr. Ruby D. Garrett for appellants.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11489

KANSAS CITY, MISSOURI, a Municipal Corporation, Appellant,

vs.

L. SINGER & SONS, a Corporation, et al.

Appeal from the District Court of the United States for the Western District of Missouri

ORDER OF SUBMISSION—November 7, 1939

This cause having been called for hearing in its regular order, by agreement of counsel in open Court, the same is submitted to the Court without oral argument on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 43] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11,480—NOVEMBER TERM, A. D. 1939

L. SINGER & SONS, a Corporation, et al., Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Appellee

Appeal from the District Court of the United States for the Western District of Missouri

No. 11,489—NOVEMBER TERM, A. D. 1939

KANSAS CITY, MISSOURI, a Municipal Corporation, Appellant,

vs.

L. SINGER & SONS, a Corporation, et al., Appellees

Appeal from the District Court of the United States for the Western District of Missouri

Mr. Ruby D. Garrett (Mr. Fred Ruark and Mr. Spurgeon L. Smithson were with him on the brief) for Appellants, Case No. 11,480.

Mr. Henry N. Ess (Mr. T. W. Bockes and Messrs. Watson, Ess, Groner, Barnett & Whittaker were with him on the brief) for Appellee, Case No. 11,480.

[fol. 44] Mr. Sam C. Blair, City Counselor, and Mr. Marcy K. Brown, Jr., Assistant City Counselor, filed a brief for Appellant, Case No. 11,489.

Mr. T. W. Bockes, Mr. Henry N. Ess, and Messrs. Watson, Ess, Groner, Barnett & Whittaker filed a brief for Appellee Union Pacific Railroad Company, Case No. 11,489.

Before Stone, Gardner, and Sanborn, Circuit Judges

OPINION—February 7, 1940

SANBORN, Circuit Judge, delivered the opinion of the Court:

The suit (No. 11,480) which gives rise to these apepals was brought by certain commission merchants of Kansas City, Missouri, to enjoin the Union Pacific Railroad Company from constructing what is alleged to be an extension of its

lines of railway in Kansas City, Kansas, until such time as it has procured a certificate of convenience and necessity from the Interstate Commerce Commission covering such construction, as required by § 402, par. (18), of the Transportation Act of 1920 [c. 91, 41 Stat. 456, 477; 49 U. S. C. § 1, par. (18)]. Kansas City, Missouri, sought leave to intervene. The railroad company filed an answer in which, among other things, it (1) denied jurisdiction; (2) asserted that the plaintiffs were not "parties in interest" within the meaning of § 402, par. (20), of the Transportation Act [c. 91, 41 Stat. 456, 478; 49 U. S. C. § 1, par. (20)]; and (3) asserted that the complaint failed to "state a claim against defendant upon which relief can be granted".[1] Thereafter the defendant railroad company applied for a hearing upon these defenses before trial.[2] The District Court heard its application together with the motion of Kansas City, Missouri, for leave to intervene. The court ruled that it had jurisdiction of the suit, but that the plaintiffs were not "parties in interest" and hence could not maintain it, and that the complaint failed to state a claim upon which relief could be granted. It also ruled that the City was not a "party in [fol. 45] interest".[3] It entered a decree dismissing the complaint and denying intervention. From this decree these appeals are taken.

The appeals challenge (1) the action of the court in considering in advance of trial the defenses sustained; (2) the ruling that the plaintiffs and the City are not "parties in interest"; and (3) the ruling that the complaint fails to state a claim upon which relief can be granted.

We think that, if it conclusively appears from the complaint filed by the plaintiffs and the complaint in intervention tendered by the City that the plaintiffs and the City are without capacity to maintain the suit and that therefore no relief could be afforded them, the court below was justified in entering a decree of dismissal in advance of trial. See General Investment Co. v. New York Central R. Co., 271 U. S. 228, 230; Carolina Power & Light Co. v. South Carolina Public Service Authority, 4 Cir., 94 F. 2d 520,

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[1] Rules of Civil Procedure for the District Courts of the United States, Rule 12 (b) (6).

[2] Ibid., Rule 12 (d).

[3] 26 F. Supp. 721.

526; Leimer v. The State Mutual Life Assurance Co., 8 Cir., (opinion filed January 5, 1940), — F. 2d —.

The vital question in these cases is whether the plaintiffs and the City are "parties in interest" within the meaning of paragraph (20), § 402 of the Transportation Act, which provides:

"Any construction [of an extension] * * * contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission [Interstate Commerce Commission], any commission or regulating body of the State or States affected, or any party in interest; * * *."

The complaint of the plaintiffs shows that they are commission merchants doing business on the Kansas City, Missouri, produce market, an old and well-established market which adequately serves the consuming public in its vicinity and receives produce from, and ships produce to, other states; that Kansas City, Missouri, is now engaged in constructing new market buildings for this market at a cost of about $500,000; that the market has suitable and adequate transportation facilities of all kinds; that the adjoining city of Kansas City, Kansas, proposes to build and is building a "Food Terminal" or produce market on a tract of land which it owns, at a cost of about $4,000,000, of which [fol. 46] $1,710,000 is a grant from the Public Works Administration of the United States, and that the balance of the necessary funds will be procured by a sale of the City's bonds to the defendant railroad company; that the defendant proposes, at an expense of some $500,000, to furnish trackage to serve this Kansas City, Kansas, market; that this trackage constitutes an extension of the defendant's lines of railroad, for the construction of which it has procured no certificate of convenience and necessity from the Interstate Commerce Commission as required by law; that the construction and operation of the proposed extension in Kansas City, Kansas, will adversely affect and will destroy the business and properties of the plaintiffs and the large investments which they have made in and adjacent to the Kansas City, Missouri, produce market; that it will create an unnecessary and uncalled for rival market at an inconvenient place without creating any more produce to be han-

dled or any more customers to be served; that it will result in the unnecessary duplication of railroad facilities at a cost of $500,000 without increasing the amount of freight to be handled; that it will divert traffic from other railroads which are now adequately handling the traffic to the Kansas City, Missouri, produce market, and will cause destructive competition between the defendant and other railroads and will cause a wasteful and needless expenditure of money by the defendant; that "for each and all of the reasons aforesaid, the construction and operation, or the construction, or the operation of the said extension or extensions of railroad by the defendant to said proposed produce market in Kansas City, Kansas, will directly and adversely affect the property interests of the plaintiffs and the public generally by bringing about a material change in the transportation situation, and will constitute an unnecessary burden upon interstate commerce directly and adversely affecting the welfare of plaintiffs and the public interest."

It is obvious that the only basis for the plaintiffs' claim that the alleged extension of the lines of the defendant to the Kansas City, Kansas, market will particularly injure them is that they do business upon the Kansas City, Missouri, market, and that if the proposed rival market in Kansas City, Kansas, functions, it will divert business from the market upon which they operate and will thus hurt them, [fol. 47] their business, and their investments in Kansas City, Missouri, and that, since the proposed extension of its tracks by the defendant is necessary to enable the rival market to function, such extension will therefore injure the plaintiffs. It seems equally obvious that, except for the fact that the proposed extension is essential to the operation of the rival market in Kansas, it could not possibly have any direct or immediate effect upon the plaintiffs, their property or their business in Missouri, other than the effect which a wasteful expenditure by the defendant of its money would have upon the public generally. The proximate cause of the injury to the plaintiffs will be the competition created by the construction and operation of the rival market, and not the construction or operation of the transportation facilities furnished to it by the defendant or by others engaged in the transportation business.

It is the plaintiffs' contention that any one whose welfare is adversely affected or threatened by the unauthorized ex-

tention of a railroad is a "party in interest" who may maintain such a suit as this.[4] The defendant, on the other hand, contends broadly that no one is a "party in interest" who cannot point to the violation of some legal duty owing by the railroad to him.[5]

We concern ourselves only with the question whether the plaintiffs and Kansas City, Missouri, are "parties in interest" within the meaning of the statute authorizing "any party in interest" to maintain such a suit. This question, we think, is to be determined from the language of the Supreme Court of the United States in Western Pacific California Railroad Co. v. Southern Pacific Co., 284 U. S. 47, where the question was whether a railroad corporation without a railroad, but which had located its proposed line and had applied for authority to build it, was a "party in interest" within the meaning of the Transportation Act so [fol. 48] that it might maintain a suit to enjoin an unauthorized extension into the territory which its proposed line was intended to serve. The Court, after quoting from Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., 270 U. S. 266, 277, said (p. 51 of 284 U. S.):

"The Texas & Pacific Ry. sought to prevent an unauthorized competitor from building an extension into territory already served by it. Prior to the statute, it could not have maintained such a suit, since the competitor's proposed action did not threaten interference with any legal right.

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[4] The plaintiffs rely upon: Western Pacific California R. Co. v. Southern Pacific Co., 284 U. S. 47; Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co. (D. C.) 286 F. 540; Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382.

[5] The defendant relies upon: Alabama Power Co. v. Ickes, 302 U. S. 464; United States ex rel. New York Warehouse, Wharf & Terminal Ass'n v. Dern, (App. D. C.), 68 F. 2d 773; Moffat Tunnel League v. United States, 289 U. S. 113; Edward Hines Yellow Pine Trustees v. United States, 263 U. S. 143; Carolina Power & Light Co. v. South Carolina Public Service Authority, 4 Cir., 94 F. 2d 520; West Tennessee Power & Light Co. v. City of Jackson, 6 Cir., 97 F. 2d 979; Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U. S. 118; Railroad Co. v. Ellerman, 105 U. S. 166; Interstate Commerce Commission v. C., R. I. & P. Ry. Co., 218 U. S. 88; St. Louis Southwestern Railway Co. v. Missouri Pacific R. Co., 289 U. S. 76.

No carrier could then demand exemption from honest competition.

"If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See Massachusetts v. Mellon, 262 U. S. 447, 488. It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may *directly* and *adversely* affect the complaint-'s welfare by bringing about some material change in the transportation situation. Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened. It alleged the beginning of an unlawful undertaking by a carrier which might prove deleterious to it as well as to the public interest in securing and maintaining proper railroad service without undue loss. It relied upon the procedure prescribed by the statute to secure an orderly hearing and proper determination of the matter. The disclosures of the bill were enough to show that the respondent's intended action might *directly* and seriously affect the project which complainant was undertaking in good faith. There was enough to give the latter the standing of a 'party in interest' within intendment of the Act." [Emphasis ours.]

The plaintiffs have no definite legal right which is threatened. They are, however, persons whose welfare may be [fol. 49] adversely affected by the bringing about of a material change in the transportation situation, in the sense that the extension proposed by the defendant, if built and operated, will enable a competitive market to function to their detriment. In that sense, we think it may safely be said that the proposed extension of defendant's lines may adversely affect the plaintiffs' welfare. We are of the opinion, however, that their complaint discloses that their welfare cannot be directly, but only indirectly and consequentially, affected by the proposed extension. They are not in com-

petition with the defendant. They are not engaged in the transportation business. Their only peculiar interest in that business is in the effect which changes in it may have upon the market where they do business and upon rival markets now or hereafter established in the territory which the plaintiffs serve.

A contention somewhat analogous to that here presented by the plaintiffs was ruled upon by this Court in Arkansas-Missouri Power Co. v. City of Kennett, 78 F. 2d 911, in which the power company sought to attack the validity of a loan and grant made by the United States to the City of Kennett to enable it to enter into competition with the power company. We said (p. 914):

"The court below was of the opinion that the power company was in no position to question the power of the federal government to loan or give money to the city of Kennett. We are in accord. The United States is not proposing to become a competitor of the power company. It will have no right, title, or interest in the plant when completed and nothing to do with operating it. The destruction of the power company's property will come about by reason of the city's operation of the plant when erected. The position of the United States is that of a lender of money, a buyer of bonds, and a giver of gifts. True, the money procured from the government will enable the city to build the plant, and, if the city builds the plant, it will no doubt operate it, and when it does operate the plant the city will take the customers of the power company, and the company's property in Kennett will become worthless or greatly impaired in value. We know of no rule of law, however, which permits one indirectly hurt, no matter how seriously, by a government expenditure, to question the power of the government to make it. In fact, the rule is to the contrary. Common- [fol. 50] wealth of Massachusetts v. Mellon, Secretary of the Treasury, et al., 262 U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078; City of Allegan, Mich., v. Consumers' Power Co. (C. C. A. 6), 71 F. 2d 477 (certiorari denied, 293 U. S. 586, 55 S. Ct. 100, 79 L. Ed. * * *). It is true that in the cases cited the plaintiffs relied upon their status as taxpayers exclusively, while in this case the plaintiff relies, in addition, upon the injury which will be done to its property by municipal competition. That injury, however, is, so far as the government is concerned, clearly consequential and indirect, as we have

pointed out. See, also, Missouri Utilities Co. v. City of California, Mo., et al., (D. C., W. D. Mo.) 8 F. Supp. 454, 465."

See, also, Moffat Tunnel League v. United States, 289 U. S. 113, 119-121; Pittsburgh & West Virginia Ry. Co. v. United States, 281 U. S. 479, 487; People v. Walsh, (Ill.) 174 N. E. 881, 882.

The complaint in intervention tendered by Kansas City, Missouri, shows that with respect to the proposed extension it stands in substantially the same position as the plaintiffs. Its market place will be injured by the establishment of the rival market, and taxable values in the City will decline with a resulting loss of revenue. The proposed extension, however, can only be the remote cause of the injuries which the City fears.

We realize that the meaning of the words "party in interest" as used in § 402, paragraph (20), of the Transportation Act might be expanded so as to include parties standing in the situation of these plaintiffs and of Kansas City, Missouri. We think that as yet persons in their situation have not been regarded as being "parties in interest" who may maintain a suit such as this. We conclude that the statute is not to be so liberally construed as to enable those who fear adverse effects upon their business from the establishment of competitive enterprises requiring transportation facilities, to maintain suits to enjoin railroads from constructing what are claimed to be unauthorized extensions to serve such enterprises.

The decree is Affirmed.

[fol. 51] DISSENTING OPINION

STONE, Circuit Judge, dissenting:

I am unable to concur in the able opinion of the majority on the issue as to whether plaintiffs and the proposed intervener are "parties in interest" within the meaning of the Act (U. S. C. A. Title 49, Section 1, par. 20). I am constrained to state the grounds for such dissent not only by the need for justifying a dissent from the views of Judges for whose judgment I have the highest respect, but also by what I conceive to be the importance of this decision to the

efficient operation of the provision of this Act requiring certificates of convenience and necessity before extensions of railway trackage are permissible (U. S. C. A. Title 49, Section 1, par. 18).

The Transportation Act was designed to place the interstate railroads "more completely than ever under the fostering guardianship and control of the [Interstate Commerce] Commission" by placing under its supervision various specified matters, among which is construction or abandonment of lines (Railroad Commission v. Southern Pacific Co., 264 U. S. 331, 341-342; Dayton-Goosecreek Ry. Co. v. United States, 263 U. S. 456, 478). The importance of this control over extensions or abandonments to realization of the purposes of the Act is obvious.

As to extension or abandonment of lines, this control of the Commission is exercised solely through the Act requirement of certificates of convenience and necessity before such extensions or abandonments are made. The means provided by the Act to force compliance with this control is by giving to "any party in interest" the right to prevent, by injunction, such extension or abandonment until the necessary certificate is obtained. This is the "only remedy" and such remedy is "both affirmative and complete" (Texas & Pac. Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., 270 U. S. 266, 273). Since the above is the only method of protecting and making fully effective this control of the Commission, the importance of any definition of "party in interest"—those who may initiate such procedure—is evident.

As shown by the petition, the "interest" of the plaintiffs is as follows. Defendant contemplates the construction of certain trackage in Kansas City, Kansas, which plaintiffs allege is an "extension", within the meaning of the Act. [fol. 52] This trackage is to serve a large produce market which is to be constructed by Kansas City, Kansas. Plaintiffs are produce merchants who own or have places of business in connection with a long established similar market in Kansas City, Missouri, which has long adequately served the area made up of and surrounding the two cities. The construction and operation of the proposed trackage would have the injurious effects following: (a) destroy or seriously and adversely affect the businesses, properties and large financial investments of plaintiffs in and adjacent to the existing Kansas City, Missouri, produce market; (b)

create a rival market far removed from the center of population and inconvenient to a great majority of the citizens of the two cities; (c) create a rival market with no increase of produce business when the present market is entirely adequate to serve the entire community; (d) result in an unnecessary duplication of railroad facilities at a cost of over $500,000.00 with no increase in freight to be handled; (e) divert traffic to defendant from other railroads which are now adequately handling the traffic to the existing produce market; (f) cause destructive competition between railroads operating in the vicinity; and (g) result in wasteful and needless expenditures by defendant.

No present purpose is served by examining, separately, the just stated allegations as to injury. It is enough to test the issue of "interest" by the position of the plaintiffs to this extension as alleged in the petition. That position is that the proposed trackage will divert business from a long established market to the financial loss of plaintiffs and that such diversion will serve no purpose useful to the communities affected thereby. The question is whether "party in interest" (within the meaning of this Act) includes those who will suffer financial loss by a change in conditions which will be brought about by the construction and operation of an extension of a railroad for which no certificate has been obtained under the Act?

Plaintiffs contend broadly that any one whose "welfare" is adversely affected by a railroad extension is a "party in interest". Defendant contends broadly that "party in interest" is confined to one asserting "the violation of a legal duty owing by the defendant [railroad] to him" and [fol. 53] that damage which springs solely from a change in competitive conditions brought about by an "extension" gives rise to no legal duty but is damnum absque injuria.

I think both contentions are, broadly, incorrect and that the meaning of the Act is to be found between these extremes.

The contention of defendant is that the Act intended that only such persons might seek this injunctive relief as could show a violation of some legal duty owing to them by the railroad proposing the extension. This contention is destroyed by the language, construing the provision of the Act, in Western Pacific California Railroad Co. v. Southern Pacific Co., 284 U. S. 47, 51-52, where, after quoting from

Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., 270 U. S. 266, 277, the Court said:

"The Texas & Pacific Ry. sought to prevent an unauthorized competitor from building an extension into territory already served by it. Prior to the statute, it could not have maintained such a suit, since the competitor's proposed action did not threaten interference with any legal right. No carrier could then demand exemption from honest competition.

If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See Massachusetts v. Mellon, 262 U. S. 447, 488. It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation. Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened. It alleged the beginning of an unlawful undertaking by a carrier which might prove deleterious to it as well as to the public interest in securing and maintain-[fol. 54] ing proper railroad service without undue loss. It relied upon the procedure prescribed by the statute to secure an orderly hearing and proper determination of the matter. The disclosures of the bill were enough to show that the respondent's intended action might directly and seriously affect the project which complainant was undertaking in good faith. There was enough to give the latter the standing of a 'party in interest' within intendment of the Act."

This quotation not only carries the meaning of "party in interest" beyond the protection of legal rights but expressly recognizes that injury through competition—not theretofore subject to legal remedy—might be, and in that case was, sufficient basis to constitute the one so injured

such a "party in interest". The decisions cited by appellee to the effect that equity affords no remedy for injuries arising solely from competitive conditions or changes therein are inapplicable. The matter here is one of statutory construction and not one of general law.

The contention of appellant that any one whose "welfare" is affected by a track "extension" is a "party in interest" seems rather too broad. The above quotation from the Western Pacific California case contains the generally stated limitations of the meaning of the statutory term as well as an application of such definition to a set of facts useful in the case before us. The Court states two general classes of persons as within the definition, towit, those having some definite legal right seriously threatened or those whose "welfare" "may be directly and adversely" affected "by bringing about some material change in the transportation situation."

The latter class was involved in that case as it is in the case before us. The main, apparently the only, direct and adverse effect upon the plaintiff in that case was that of competition through the trackage contemplated by the Southern Pacific (p. 52). This effect was, obviously, a business—a financial—effect. Such an effect was "something more than a common concern for obedience to law" (Western Pacific California case, supra, p. 51). Without attempting further to define that "welfare" which, if "directly and adversely" affected, brings one within the Act, it is sufficient for our present purposes that direct financial loss is within the Act. Such financial loss is clearly [fol. 55] stated in this petition and might naturally result from the situation pleaded therein. I think the plaintiffs stated enough in the petition to give them the standing of a "party in interest" within the intendment of the Act.

As to appellant Kansas City, Missouri, the allegation of financial loss is in taxes through diminution of real property values and possible movement of the present produce merchants from the city to the vicinity of the contemplated market in Kansas City, Kansas. Also loss through the situation that it is now erecting a new market structure at considerable cost. It seems to me these allegations are of sufficient definite and adverse financial effect to bring the city within the statute.

I cannot agree that the proposed extension by defendant does not directly affect complainants and intervener. It

is quite evident from the complaint and from the offered intervening petition (1) that plaintiffs and intervener will be financially affected by the proposed rival market; and (2) that such rival market cannot come into existence without this extension by defendant.

It is true that the law furnishes no protection against competition of a rival market. It is equally true that the Act places it in the power of the Commission to refuse a certificate for an extension where the natural and intended effect of such extension is to create a rival market which will serve no useful public purpose and which will result in direct financial loss to an existing market. Such effects certainly "affect the complainant's welfare by bringing about some material change in the transportation situation", as stated in the foregoing quotation from the Western Pacific California case.(1)

[fol. 56] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11480

L. SINGER AND SONS, a Corporation; WM. F. HELM, Doing Business as Wm. F. Helm Produce Company; Arthur Harris, Doing Business as Kansas City Fruit and Produce Company; Robert T. Kesting, Doing Business as H. Kesting Produce Company; Chester F. Urban, Doing Business

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(1) In present this bill, Chairman Esch of the House Committee on Interstate and Foreign Commerce said:

"Before a road or an extension thereof can be built it must get what is called in this bill a certificate of convenience or necessity from the commission as a condition precedent to the building of a single rod of the extension or of the new line. That means that the commission must first investigate the situation. It must first consult the communities that would be connected or would be located on the proposed line. It must consult the *shipping interests and the producing interests and all other interests that might be involved* and then determine whether or not it should issue a certificate of convenience and necessity." (Italics supplied.)

as Maguire-Urban Commission Company; Fara D'Angelo, Doing Business as D'Angelo Celery House; R. E. Mills, Doing Business as Mills Produce Company; H. R. Raker, Doing Business as Raker Produce Company; Ralph Hurst; Ralph Hurst and Company, a Corporation; Reuben Kaplan, Doing Business as Royal Food Stores; Earl J. Tranin; Merchants Bank Building and Investment Company, a Corporation, and North Side Business and Improvement Association, a Pro Forma Decree Corporation, Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY, a Corporation

No. 11489

KANSAS CITY, MISSOURI, a Municipal Corporation, Appellant,

vs.

L. SINGER AND SONS, a Corporation; WM. F. HELM, Doing Business as Wm. F. Helm Produce Company; Arthur Harris, Doing Business as Kansas City Fruit and Produce Company; Robert T. Kesting, Doing Business as H. Kesting Produce Company; Chester F. Urban, Doing Business as Maguire-Urban Commission Company; Fara D'Angelo, Doing Business as D'Angelo Celery House; R. E. Mills, Doing Business as Mills Produce Company; H. R. Raker, Doing Business as Raker Produce Company; [fols. 57-61] Ralph Hurst; Ralph Hurst and Company, a Corporation; Reuben Kaplan, Doing Business as Royal Food Stores; Earl J. Tranin; Merchants Bank Building and Investment Company, a Corporation; North Side Business and Improvement Association, a Pro Forma Decree Corporation, and Union Pacific Railroad Company, a Corporation

Appeals from the District Court of the United States for the Western District of Missouri

DECREE—February 7, 1940

These causes came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in these causes, be, and the same is hereby, affirmed, without the taxation of costs in favor of either of the parties in this Court.

[fol. 62] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 63] IN SUPREME COURT OF THE UNITED STATES

STIPULATION TO OMIT FROM RECORD NONESSENTIAL MATTERS, AS PROVIDED BY PARAGRAPH 8 OF RULE 38—Filed May 31, 1940

It is hereby stipulated and agreed by and between the parties in the above entitled cause, by and through their respective counsel of record, that in printing the record in said cause for the use of the Supreme Court, the clerk may omit from the printed record the following matters which are not essential to a consideration of the questions presented by the petition for certiorari, said matters appearing in the transcript of the record certified by the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit at the pages indicated.

It is further stipulated and agreed that the omission from the record of these nonessential matters shall not prejudice, or be used to advantage by either party to said cause.

Pages	Matters
28 and 29	Stipulation Designating Parts of Record and Proceedings to be Included in Record on Appeal.
38	Appearance of Counsel for Appellants in Cause No. 11480.
38	Appearance of Mr. T. W. Bockes and Mr. Henry N. Ess as Counsel for Appellee in Cause No. 11480.

[fol. 64]

39	Appearance of Mr. T. W. Bockes as Counsel for Appellee in Cause No. 11480

Pages	Matters
39	Appearance of Mr. Fred Belemere and Mr. Marcy K. Brown, Jr., as Counsel for Appellant in Cause No. 11489.
39	Appearance of Mr. John M. Cleary as Counsel for Appellant in Cause No. 11489.
40	Appearance of Counsel for Appellee, Union Pacific Railroad Co., in Cause No. 11489.
40	Appearance of Messrs. Garrett & Ruark and Mr. Spurgeon L. Smithson as Counsel for Appellees L. Singer & Sons, et al., in Cause No. 11489.
55	Motion of Appellants to Stay Issuance of Mandate in Cause No. 11480.
56	Order Staying Issuance of Mandate in Cause No. 11480.
56	Motion of Appellant to Stay Issuance of Mandate in Cause No. 11489.
57	Order Staying Issuance of Mandate in Cause No. 11489.

Dated this 27th day of May, 1940.

John M. Cleary, Ruby D. Garrett, Fred Ruark, Spurgeon L. Smithson, Counsel for Petitioners.
A. C. Spencer, Henry N. Ess, Counsel for Respondent.

[fol. 64½] [File endorsement omitted.]

[fol. 65] SUPREME COURT OF THE UNITED STATES

No. 825

ORDER ALLOWING CERTIORARI—Filed April 22, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 66] SUPREME COURT OF THE UNITED STATES

No. 826

ORDER ALLOWING CERTIORARI—Filed April 22, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 44,232, 44,233. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 34. L. Singer & Sons et al., petitioners, vs. Union Pacific Railroad Company. Term No. 35. Kansas City, Missouri, petitioner, vs. L. Singer & Sons et al. Petitions for writs of certiorari and exhibit thereto. Filed March 19, 1940. Term Nos. 34, O. T., 1940, 35, O. T., 1940.

FILE COPY

No. [redacted] 34

Office - Supreme Court, U. S.
FILED
MAR 19 1940
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

October Term, 1939.

L. Singer & Sons, a Corporation, *et al.*, *Petitioners*,

vs.

Union Pacific Railroad Company, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

John M. Cleary,
Roby D. Garrett,
Fred Ruark,
Spurgeon L. Smithson,
Counsel for Petitioners.

[illegible] PRINTING COMPANY, KANSAS CITY, MO.

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In the

Supreme Court of the United States

October Term, 1939.

L. SINGER & SONS, a Corporation, *et al.*, *Petitioners*,

vs.

UNION PACIFIC RAILROAD COMPANY, a Corporation, *Respondent*.

No. .....

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

May it Please the Court:

Your petitioners, L. Singer & Sons, a corporation, *et al.*,[1] respectfully petition this Court to grant a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, and to remove therefrom to this Court, for review, the record of the case therein lately

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[1]The names of all the petitioners are as follows: L. Singer & Sons, a corporation; Wm. F. Helm, doing business as Wm. F. Helm Produce Company; Arthur Harris, doing business as Kansas City Fruit & Produce Company; Robert T. Kesting, doing business as H. Kesting Produce Company; Chester F. Urban, doing business as Maguire-Urban Commission Company; Fara D'Angelo, doing business as D'Angelo Celery House; R. E. Mills, doing business as Mills Produce Company; H. R. Raker, doing business as Raker Produce Company; Ralph Hurst; Ralph Hurst & Company, a corporation; Reuben Kaplan, doing business as Royal Food Stores; Earl J. Tranin; Merchants Bank Building & Investment Company, a corporation, and North Side Business & Improvement Association, a *pro forma* decree corporation.

pending of L. Singer & Sons, *et al.*, Appellants, v. Union Pacific Railroad Company, Appellee, being case No. 11480 on the docket of that court.

This was a suit brought by petitioners, who are commission or produce merchants and property owners within and adjacent to the City Market of Kansas City, Missouri, to enjoin the respondent from constructing and operating an extension of its line of railroad to a proposed rival produce market and terminal in Kansas City, Kansas, until respondent shall have procured a certificate of convenience and necessity from the Interstate Commerce Commission pursuant to the provisions of paragraph (18), Section 402 of the Transportation Act (Act of Congress approved February 28, 1920, 41 Stat. 477, 49 U. S. C. A. 1 [18]).[2]

The extent of respondent's participation in the project is shown by the fact that the cost of the railroad tracks and facilities constructed and to be constructed by respondent is about $500,000.00. In addition, respondent assisted in financing the construction of the market by purchasing $3,000,000.00 of revenue bonds issued by Kansas City, Kansas. The total cost of the market is approximately $4,000,000.00.

In the decision sought to be reviewed, decided February 7, 1940 (R. 42), (not yet reported) the majority of the Circuit Court of Appeals held that petitioners are not "parties in interest" entitled to maintain a suit to enjoin the unauthorized, and therefore, as alleged, unlaw-

[2]The pertinent parts of said paragraph read as follows:

No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad. . . .

ful extension of a line of railroad under the provisions of paragraph (20), Section 402 of the Transportation Act (41 Stat. 478, 49 U. S. C. A. 1 [20]). A vigorous dissenting opinion (R. 49) was rendered by Circuit Judge Kimbrough Stone, who was of opinion that petitioners were "parties in interest," relying in part upon the decisions of this Court in *Western Pacific California Railroad Co.* v. *Southern Pacific Company*, 284 U. S. 47, and *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266.

A certified copy of the record, including the proceedings in the Circuit Court of Appeals for the Eighth Circuit, and additional copies of said record and proceedings, as required by Rule 38 of the Rules of this Court, have been forwarded to the Clerk of this Court by the Clerk of the Circuit Court of Appeals for the Eighth Circuit.

I.

Summary and Short Statement of the Matters Involved.

The principal question involved in this petition is: Whether the United States Circuit Court of Appeals for the Eighth Circuit was in error, as we contend it was, in affirming (R. 42) (not yet reported) a decree of the District Court of the United States for the Western Division of the Western District of Missouri (R. 25, 30) (26 F. Supp. 721), dismissing petitioners' complaint (R. 1) because under the allegations thereof the petitioners are not "parties in interest" entitled to maintain this suit under the provisions of paragraph (20), Section 402 of the Transportation Act (Act of Congress approved

February 28, 1920, 41 Stat. 478, Title 49 U. S. C. A. Section 1, paragraph 20).[3]

Briefly stated, the complaint (R. 1) alleges that respondent proposes to construct and operate in interstate commerce, at the cost of some $500,000, an "extension" of its line of railroad which will serve a large produce market costing approximately $4,000,000.00, which is to be constructed by the City of Kansas City, Kansas; that petitioners are produce or commission merchants who own or have places of business within or in connection with a similar market which has long been established in Kansas City, Missouri, and which has adequately served the two cities; and that the Kansas City, Missouri, market is now adequately served by a number of railroads. It is further alleged in the complaint that the change in the transportation situation which will be created by the unauthorized, and therefore unlawful, extension of respondent's line of railroad may directly and adversely affect your petitioners' welfare. More specifically, petitioners would be injured by reason of the fact that the construction and operation of the proposed extension would: Destroy or seriously and adversely affect the businesses, properties and the large financial investments of petitioners within and adjacent to the existing Kansas City, Missouri, market; create a rival produce market, far removed from the center of population and inconvenient to a greater majority of the citizens of the two

[3]The pertinent parts of the paragraph referred to read as follows: . . . From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulatory body of the state or states affected, *or any party in interest* . . . (Italics ours.)

cities, without any increase in the amount of business handled and notwithstanding the fact that the present Kansas City, Missouri, market is entirely adequate; result in unnecessary and wasteful duplication of railroad facilities, at a cost of over $500,000.00, with no increase in freight to be handled; divert traffic to respondent from other railroads which are now adequately handling the traffic to the existing produce market; cause destructive competition between railroads serving the two cities and impair the adequacy of their service to petitioners; and result in wasteful and needless expenditures by respondent.

The complaint is set forth in full at pages 1 to 5 of the record.

Respondent's answer (R. 20) asserted four defenses, the first three of which said defenses were: (1) That the court had no jurisdiction over the subject matter of the action; (2) That petitioners are not parties in interest under the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A., Section 1, Par. 20) and were not authorized to institute or maintain any action thereunder; and (3) That the complaint failed to state a claim against defendant upon which relief could be granted.

After the filing of the aforesaid answer, the respondent made application to the District Court to hear and determine before trial the first three defenses set forth therein (R. page 24). The hearing was granted, no evidence was offered, and the case was submitted to the court on the pleadings and briefs of counsel.

The District Court held that it had jurisdiction of the suit but that the respondents were not "parties in interest" within the meaning of the statute and hence could

not maintain the action, and that, as a consequence, the complaint failed to state a claim upon which relief could be granted.

Petitioners herein, as plaintiffs, then appealed to the Circuit Court of Appeals for the Eighth Circuit. On February 7, 1940, the Circuit Court, by a two to one decision, affirmed the decree of the District Court. A strong dissenting opinion was written by Judge Stone.

The question whether petitioners are parties in interest within the meaning of paragraph (20) of Section 402 of the Transportation Act was duly raised and passed upon at all stages of the proceeding. After the filing of the complaint by petitioners, defendant filed an answer (R. 20) alleging as a second defense that plaintiffs were not parties in interest under the provisions of said Section. The District Court upheld that contention in paragraph 3 of its decree (R. 25). Petitioners in their statement of points on appeal alleged in paragraph III thereof that the lower court erred in holding that plaintiffs were not such parties in interest (R. 34). The majority opinion of Circuit Court of Appeals upheld the contention that plaintiffs were not parties in interest (R. 42), and petitioners assign such action as error in their specifications of errors herein.

It will be observed that the Circuit Court of Appeals merely found that parties in the situation of petitioners have not "as yet" been regarded as "parties in interest" within the meaning of that statute. It was said in the majority opinion (R. 48):

> "We realize that the meaning of the words 'party in interest' as used in Section 402, paragraph (20), of the Transportation Act *might be expanded so as to include parties standing in the situation of these plaintiffs and of Kansas City, Missouri.* We think

> that as yet persons in their situation have not been regarded as being 'parties in interest' who may maintain a suit such as this." (Italics ours.)

It is petitioners' position that, on the contrary, the complaint, as pointed out clearly in the dissenting opinion, showed how the welfare of petitioners would be directly and adversely affected as a result of the proposed extension; how petitioners would suffer a direct financial loss; and how the rail service which they now receive might be impaired, all as a result of the material change in the transportation situation created by the proposed extension of respondent's railroad. After describing the essential allegations of the complaint in substantially the same manner as we have hereinbefore, the following conclusion is stated in the dissenting opinion (R. 52):

> "Without attempting further to define that 'welfare' which, if 'directly and adversely' affected, brings one within the Act, it is sufficient for our present purposes that direct financial loss is within the Act. Such financial loss is clearly stated in this petition and might naturally result from the situation pleaded therein. I think the plaintiffs stated enough in the petition to give them the standing of a 'party in interest' within the intendment of the Act."

As explained in Judge Stone's dissenting opinion, the same reasoning upon which the Court held that the Western Pacific California Railroad Company was a party in interest in the case of *Western Pacific California Railroad Company* v. *Southern Pacific Company*, 284 U. S. 47, 51-52, would establish that petitioners are parties in interest within the meaning of paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49, U. S. C. A., Section 1, paragraph [20]).

Referring to the above case, Judge Stone said (R. 52):

> "The court states two general classes of persons as within the definition, to-wit: those having some definite legal right seriously threatened or those whose 'welfare' 'may be directly and adversely' affected 'by bringing about some material change in the transportation situation.'
>
> "The latter class was involved in that case as it is in the case before us. The main, apparently the only, direct and adverse effect upon the plaintiff in that case was that of competition through the trackage contemplated by the Southern Pacific (p. 52). This effect was, obviously, a business—a financial—effect. Such an effect was 'something more than a common concern for obedience to law'. (*Western Pacific California Railroad Company, supra,* p. 51). Without attempting further to define that 'welfare' which, if 'directly and adversely' affected, brings one within the Act, it is sufficient for our present purposes that direct financial loss is within the Act. Such financial loss is clearly stated in this petition and might naturally result from the situation pleaded therein."

It is apparent from the complaint that petitioners come within the second, if not within the first, of the two general classes of persons which this Court found in the Western Pacific California Railroad Company case, *supra,* to be parties in interest within the meaning of the statute involved. The allegations of the complaint clearly establish that their "welfare" "may be directly and adversely" affected by the proposed "material change in the transportation situation." They may suffer financial loss growing out of the damage to their business and property resulting from the creation and operation of a rival market made possible by the change in the transportation situation, and they also may be subjected to a loss of

transportation service supplied by competing railroads whose service may be curtailed as a result of impairment of their revenues by reason of the new competition set up by the change in the transportation situation. They are thus shown to come within the class of persons which Congress sought to protect through the enactment of the statute.

Judge Stone also referred to the importance of the question involved in this case. He said (R. 49):

> "I am constrained to state the grounds for such dissent * * * also *by what I conceive to be the importance of this decision to the efficient operation of the provision of this Act* requiring certificates of convenience and necessity before extensions of railway trackage are permissible (U. S. C. A. Title 49, Section 1, par. 18)." (Italics ours.)

Petitioners contend that the majority of the Circuit Court of Appeals erroneously construed the meaning of "any party in interest" as used in the statute and as interpreted by this Court in *Western Pacific California Railroad Company* v. *Southern Pacific Company, supra.*

The majority opinion of the Circuit Court of Appeals appears to be based primarily upon the meaning of "party in interest" as the term is commonly accepted by courts of equity. As used in the statute under which petitioners brought this action, the phrase has a special, broader and more comprehensive meaning. This Court said in the Western Pacific California Railroad Company case, *supra* (284 U. S., l. c. 51):

> "If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity; the

paragraphs under consideration would not materially aid the Congressional plan for promoting transportation."

Discarding this interpretation of the phrase, this Court held in that case (l. c., p. 51):

> "It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened *or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation.*" (Italics ours.)

Petitioners contend that the opinion of the majority of the Circuit Court of Appeals in the present case is clearly at variance and in conflict with the foregoing interpretation of the statute by this Court and that petitioners' complaint shows that the construction and operation of the proposed extension of railroad by the respondent:

1. Will directly and adversely affect the property interests of petitioners and will cause them to suffer a financial loss;

2. Will bring about a material change in the transportation situation, which will constitute an unnecessary burden upon interstate commerce and directly and adversely affect the welfare of petitioners.

II.

Jurisdiction.

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, C. 229, 43 Stat. 936 (28 U. S. C. A. 347).

III.

Questions Presented.

As already indicated in Section I of this petition the questions presented are whether the petitioners, who are commission merchants and property owners within and adjacent to the City Market of Kansas City, Missouri, are "parties in interest" within the meaning of paragraph (20), Section 402 of the Transportation Act (41 Stat. 478, Title 49, U. S. C. A., Section 1, Par. 20), and entitled "to maintain an action against respondent to prevent the respondent constructing and operating an extension of its railroad to a proposed rival produce market in Kansas City, Kansas, which will directly and adversely affect the property interests of the petitioners by bringing about a material change in the transportation situation, and will constitute an unnecessary burden upon interstate commerce directly and adversely affecting the welfare of petitioners, and for which said extension the respondent has not procured a certificate of convenience and necessity from the Interstate Commerce Commission as required by law.

IV.

Reasons for Granting the Writ.

The discretionary power of this Court to grant a writ of certiorari is urged and invoked upon the following grounds:

1. The decision and judgment of the Circuit Court of Appeals is contrary to the decisions of this Court in *Western Pacific California R. R. Co.* v. *Southern Pacific Company*, 284 U. S. 47, and *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, construing the provisions of the Transportation Act (41 Stat.

456, 477, 478), and defining the meaning of the phrase "party in interest" as used in paragraph (20), Section 402 of the Act.

2. The decision and judgment of the Circuit Court of Appeals leaves in confusion the question as to the meaning of the phrase "party in interest" as used in paragraph (20), Section 402 of the Transportation Act.

3. The decision and judgment of the Circuit Court of Appeals involves an important question of federal law which should be definitely settled by this Court.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Eighth Circuit to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals for the Eighth Circuit be reversed; all based on the reasons and grounds hereinbefore recited.

JOHN M. CLEARY,
RUBY D. GARRETT,
FRED RUARK,
SPURGEON L. SMITHSON,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The decree of the District Court of the United States for the Western Division of the Western District of Missouri, holding that petitioners are not "parties in interest" who may maintain this action; that the complaint fails to state a claim upon which any relief can be granted, and directing a dismissal of the complaint, appears in the Record at page 25, and the memorandum opinion of the court appears in the Record at page 30, and is reported in 26 F. Supp. 721. The opinion of the Circuit Court of Appeals for the Eighth Circuit affirming the decree of the District Court was dated and entered February 7, 1940, and is found in the Record at page 42. (Not yet reported.)

II.

Jurisdiction.

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (C. 229, 43 Stat. 936, 28 U. S. C. A. 347). The date of the application for the writ may be taken as of the date of the filing of the petition in the office of the clerk of this Court.

III.

Statement of the Case.

A statement of the case is set forth in the foregoing petition under the caption "Summary and Short Statement of the Matters Involved," to which reference is hereby made.

IV.

Specifications of Errors.

1. The Circuit Court of Appeals for the Eighth Circuit erred in affirming the decree and judgment of the United States District Court for the Western Division of the Western District of Missouri adjudging and decreeing that petitioners are not, nor are any of them "parties in interest", who may maintain this action under the provisions of paragraph (20) of Section 1 of the Transportation Act. (41 Stat. 478, Title 49, U. S. C. A., Sec. 1, Par. 20.)

2. The said Circuit Court of Appeals erred in affirming the decree and judgment of the said District Court adjudging and decreeing that the complaint fails to state a claim upon which any relief can be granted, for the reason that said complaint states a good cause of action and a claim on which relief can be granted under the provisions of said Transportation Act.

3. The said Circuit Court of Appeals erred in affirming the decree and judgment of the said District Court dismissing petitioners' complaint, for the reason that said complaint states a good cause of action and a claim upon which relief can be granted under the provisions of said Transportation Act.

4. The said Circuit Court of Appeals erred in affirming the decree and judgment of the said District Court, and

in determining that the petitioners are not "parties in interest" within the meaning of said Transportation Act, because such determination is contrary to the purposes of the Act, and conflicts with the decisions of this Court, interpreting the meaning of said phrase, in *Western Pacific California Railroad Co.* v. *Southern Pacific Company*, 284 U. S. 47, and *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266.

V.

Argument.

We omit argument here because the reasons given in the petition for the writ plainly state the position of the petitioners and show their right to have the writ issued as prayed.

Conclusion.

It is therefore respectfully submitted that this case is one of great importance calling for the exercise by this Court of its supervisory powers in order that justice be done herein and that the confusion and conflicts on important questions herein involved be corrected, and that to such end a writ of certiorari should be granted and this court should review the decision of the Circuit Court of Appeals for the Eighth Circuit and finally reverse it.

Respectfully submitted,

JOHN M. CLEARY,
RUBY D. GARRETT,
FRED RUARK,
SPURGEON L. SMITHSON,
All of Kansas City, Missouri,
Counsel for Petitioners.

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In the

Supreme Court of the United States

October Term, 1940.

No. 34.

L. SINGER & SONS ET AL., *Petitioners,*

vs.

UNION PACIFIC RAILROAD COMPANY, *Respondent.*

PETITIONERS' BRIEF.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

JOHN M. CLEARY,
RUBY D. GARRETT,
FRED RUARK,
SPURGEON L. SMITHSON,
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In the

Supreme Court of the United States

October Term, 1940.

No. 34.

L. SINGER & SONS ET AL., *Petitioners,*

vs.

UNION PACIFIC RAILROAD COMPANY, *Respondent.*

PETITIONERS' BRIEF.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

I.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit appears in the Record beginning at page 33 and is reported in 109 Fed. (2d) 493. The opinion of the District Court for the Western District of Missouri appears in the Record beginning at page 25 and is reported in 26 Fed. Supp. 721.

II.

JURISDICTION.

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (C. 229, 43 Stat. 936, 28 U. S. C. A. 347).

III.

STATEMENT OF THE CASE.

Nature of Case.

The suit is to enjoin the respondent from building and operating an extension of its railroad consisting of a produce terminal and appurtenant trackage in Kansas City, Kansas, until such time as it has applied for and obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require the construction and operation of said extension. The City of Kansas City, Missouri, filed motion for leave to intervene as a plaintiff (R. 5).

Petitioners' Complaint.

Briefly stated, the complaint (R. 1) alleges that respondent proposes to construct and operate in interstate commerce, at a cost of some $500,000.00, an "extension" of its line of railroad which will serve a large produce market costing approximately $4,000,000.00 which is to be constructed by the respondent and the City of Kansas City, Kansas; that petitioners are produce or commission merchants who own or have places of business within or in connection with a similar market which has long been established in Kansas City, Missouri, and which has adequately served the two cities; and that the Kansas City, Missouri, market is now adequately served by a number of railroads. It is further alleged in the complaint that the change in the transportation situation which will be created by the unauthorized, and therefore unlawful, extension of respondent's line of railroad will directly and adversely affect petitioners' welfare. More specifically,

petitioners would be injured by reason of the fact that the construction and operation of the proposed extension would: Destroy or seriously and adversely affect the businesses, properties and the large financial investments of petitioners within and adjacent to the existing Kansas City, Missouri, market; create a rival produce market, far removed from the center of population and inconvenient to a great majority of the citizens of the two cities, without any increase in the amount of business handled and notwithstanding the fact that the present Kansas City, Missouri, market is entirely adequate; result in unnecessary and wasteful duplication of railroad facilities, at a cost of over $500,000.00, with no increase in freight to be handled; divert traffic to respondent from other railroads which are now adequately handling the traffic to the existing produce market; cause destructive competition between railroads serving the two cities and impair the adequacy of their service to petitioners; and result in wasteful and needless expenditures by respondent.

Respondent's Answer.

Respondent's answer (R. 18) asserted four defenses, the first three of which defenses were: (1) That the court had no jurisdiction over the subject matter of the action; (2) That petitioners are not parties in interest under the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A., Section 1, Par. 20) and were not authorized to institute or maintain any action thereunder; and (3) That the complaint failed to state a claim against defendant upon which relief could be granted.

After filing answer the respondent made application to the court to hear and determine before trial said first

three defenses (R. 22). The hearing was granted, no evidence was offered, and the case was submitted to the court on the pleadings and briefs of counsel.

Opinions Below.

The District Court held that it had jurisdiction of the suit but that the petitioners were not "parties in interest" within the meaning of the statute and hence could not maintain the action, and that, as a consequence, the complaint failed to state a claim upon which relief could be granted (R. 23, 25).

The Court of Appeals for the Eighth Circuit, by a two to one decision, affirmed the decree of the District Court (R. 33). A strong dissenting opinion was written by Judge Stone (R. 40).

IV.

SPECIFICATIONS OF ERRORS.

1. The Circuit Court of Appeals for the Eighth Circuit erred in affirming the decree and judgment of the United States District Court for the Western Division of the Western District of Missouri adjudging and decreeing that petitioners are not, nor are any of them "parties in interest" who may maintain this action under the provisions of paragraph (20) of Section 1 of the Transportation Act (41 Stat. 478, Title 49, U. S. C. A., Sec. 1, Par. 20).

2. The said Circuit Court of Appeals erred in affirming the decree and judgment of said District Court adjudging and decreeing that the complaint fails to state a claim upon which any relief can be granted, for the reason that said complaint states a good cause of action and a claim on which relief can be granted under the provisions of said Transportation Act.

3. The said Circuit Court of Appeals erred in affirming the decree and judgment of the said District Court dismissing petitioners' complaint, for the reason that said complaint states a good cause of action and a claim on which relief can be granted under the provisions of said Transportation Act.

4. The said Circuit Court of Appeals erred in affirming the decree and judgment of said District Court, and in determining that the petitioners are not "parties in interest" within the meaning of said Transportation Act, because such determination is contrary to the purposes of the Act, and conflicts with the decisions of this Court, interpreting the meaning of said phrase, in *Western*

Pacific California Railroad Co. v. *Southern Pacific Company*, 284 U. S. 47, and *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266.

V.

STATUTES INVOLVED.

It is alleged in the complaint that respondent failed to secure a certificate of public convenience and necessity for the construction of the extension, as required by paragraph (18), Section 1, of the Transportation Act, 1920 (Title 49 U. S. C. A., Sec. 1, Par. 18), which provides as follows:

> "(18) No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Petitioners contend that, because the respondent failed to secure a certificate of public convenience and necessity, they are parties in interest who are authorized to maintain the action under paragraph (20) of Section 1, Transportation Act, 1920 (Title 49 U. S. C. A., Sec. 1, Par. 20), which provides as follows:

"(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance or the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; * * *."

VI.

ARGUMENT.

1. Petitioners are parties in interest and authorized and entitled to institute and maintain this action under he laws of the United States and particularly under the provisions of Paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 1, Par. 20).

Paragraph (20) of Section 1 of the Interstate Commerce Act reads in part as follows:

> "Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, *or any party in interest.*" (Italics ours.)

The lower court held that the petitioners are not parties in interest within the meaning of this statute because their interests are not directly affected by the construction and operation of the trackage in connection with the new food terminal. Seemingly the court proceeds upon the theory that the petitioners may not maintain this suit because they do not possess such a clear legal right as would entitle them to relief under the rules commonly accepted by courts of equity. We are not concerned to combat the proposition of whether, in the absence of the statutory provision in question, the petitioners would have no right of action, or to analyze the supporting cases cited by the court below and by the respondent. We rely upon the statute as creating a new and more liberal rule for application in cases of this sort in the transportation

field. This court has already held that such is the purpose and effect of the statute. *Western Pacific California R. R. Co.* v. *Southern Pacific Company,* 284 U. S. 47. The court said in that case (l. c. 51):

> "If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation."

Prior to 1920, the Interstate Commerce Act did not contain paragraphs 18 to 22 of Section 1. These sections were added by the so-called Transportation Act of 1920. Prior to 1920 the Act placed no restraint on competition between the railroads in the way of the construction of competing lines. One line might duplicate the facilities of another although there was no public necessity for so doing. Competition was unrestricted. Congress recognized that the building of unnecessary lines by the carriers, the duplication of facilities already adequate to serve the needs of the public and unrestricted competition between carriers was a matter in which the public had an interest; that such action on the part of carriers imposed a burden upon commerce directly affecting the public interest, and which we allege includes and particularly affects the interests of petitioners because of their businesses and situation. In line with this general theory as to the passage of the Transportation Act, this Court said in *Western Pacific California R. R. Co.* v. *Southern Pacific Company, supra* (l. c. 50):

> "Paragraphs 18 to 22, *supra,* were considered here in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.,* 270 U. S. 266, and were declared to be

> part of the general plan by which Congress intended to promote development and maintenance of adequate railroad facilities. It was there said, p. 277: 'It (Congress) recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival it may be the public which ultimately bears the loss. See *Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563; New England Divisions Case, 261 U. S. 184; Chicago Junction Case, 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331. The Act sought among other things, to avert such losses.'"

Thus it will be seen that this Court in the case last cited, as well as in the case of *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, recognized the purpose of Congress in the enactment of these sections of the Act.

The fact that in each of these cases a railroad happened to be the plaintiff does not preclude others designated in the statute from bringing the action. If it had been the purpose of Congress to limit the right to bring injunctive actions of this character to the United States, the Interstate Commerce Commission, or any commission or regulating body of the State or States affected, or to any railroad whose territory is invaded by another carrier, there would have been no need for the addition of the following phrase of the section reading "OR ANY

PARTY IN INTEREST." "Any party in interest" has a broad and comprehensive meaning and certainly should not be construed to mean only "any common carrier affected." Had Congress intended to so restrict its meaning it certainly would not have used such a general and all-inclusive phrase. It clearly was the purpose of Congress by this phrase to extend and not limit or restrict those who might bring the action.

All that is necessary to constitute a plaintiff a "party in interest" within the meaning of the statute is clearly set forth in the opinion of this Court in *Western Pacific California R. R. Co. supra*, wherein the court said (l. c. 51):

> "It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or *that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation.*" (Italics ours.)

The decision of the court below amounts to a holding that a shipper can not be a "party in interest" entitled under the Interstate Commerce Act to maintain an action to enjoin an unauthorized extension of line. It is impossible to conceive a case where a shipper would be more directly and adversely affected by an unauthorized extension than under the facts set forth in the complaint. If petitioners here are without sufficient standing, then no shipper would ever be able to maintain such a suit. It means that only a competing carrier is within the term "party in interest" and that only the carrier is entitled to relief under the statute. Section 1 (18-22) is thus construed as though it were intended solely for the pro-

tection of carriers and not at all for the protection of shippers.

This construction of the statute challenges attention. It is utterly inconsistent with the purpose of Congress in passing the Interstate Commerce Act. The principal purpose in enacting this legislation was to protect shippers from the evils which had arisen under the unregulated management of the affairs of the railroad companies. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 210. "The Act was passed," this court said in *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, 638 "for the protection of those who pay or bear the rates." Every part of the Act, including the provisions under consideration, should be construed with the primary legislative purpose in mind and so far as possible in harmony with it. In this view the only possible construction of the broad term "any party in interest" is that it is intended to include both the carriers and the shippers interested in any given transportation situation.

In conformity with this purpose, it is the policy of the Interstate Commerce Act and related statutes to permit shippers, commercial organizations and cities to participate not only in proceedings before the Commission, but also in those before the courts where the application of these statutes is involved. Any person claiming to be damaged by an interstate carrier may either make complaint to the Commission or bring suit in a Federal District Court. Title 49 U. S. C. A., Sec. 9. Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal corporation, may make complaint to the Commission regarding a violation of the statute. Title 49 U. S. C. A., Sec. 13(1). In proceedings before the Commission or before a District Court

to put a stop to rebates and concessions all persons interested in or affected by the rate, regulation or practice under consideration may be made parties. Title 49 U. S. C. A., Secs. 42, 43. Communities, associations, corporations, firms and individuals who are interested in a controversy before the Interstate Commerce Commission or in any suit brought under the provisions of Sections 20, 43 and 49 of Title 49 may intervene in such suit at any time after its institution, and the Attorney General may not discontinue such suit over the objection of such intervener, but the intervener may prosecute, defend or continue the suit irrespective of the action or nonaction of the Attorney General. Title 28 U. S. C. A., Sec. 45a.

The specific purpose underlying the enactment of the provisions of Section 1 (18-22) now under consideration is in accord with the general purpose underlying the statute of which it is a part. The objective of these paragraphs was not primarily the protection of the railroads, but of interstate commerce. "The certificate issues," the court said in *Colorado* v. *United States,* 271 U. S. 153, 162, "not primarily to protect the railroad but to protect interstate commerce from undue burdens or discrimination." While in that case the issue was one of abandonment of line, the holding of the court is equally applicable to an extension of line because the two things are both covered by the same statutory provisions and grew out of the same legislative policy. Since the primary purpose in both instances is to protect interstate commerce, it must be that the primary protection of the statute was designed for the shippers who keep that commerce alive; and yet these shippers are by the decision below denied any standing in court to maintain an action under the very statute passed for their protection.

Courts have recognized that the phrase "parties in

interest" is not confined to railroads. In *Detroit & M. Ry. Co.* v. *Boyne City G. & A. R. Co.*, 286 Fed. 540 (D. C. E. D. Mich.), one of the plaintiffs was a land owner whose land was sought to be condemned, and it was held that he had the necessary interest. In that case, which was really a consolidation of two cases, the court held (Syl. 4):

> "A railroad company with which a proposed extension by another company will come in competition, or the owner of land over which such extension will pass, is a 'party in interest', within the meaning of Interstate Commerce Act, Sec. 1, Par. 20, as amended by Transportation Act, Feb. 28, 1920, Sec. 402, and may maintain a suit to enjoin construction of such extension in violation of the act."

It is to be observed that this was the holding although, as a matter of law, the plaintiff in that case was entitled to full compensation for damages in the condemnation suit. In the case at bar, on the contrary, petitioners are without any remedy whatever except through this injunction suit. In *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, the owner of a ferry boat situated about twenty miles from the site of the proposed extension was held to be a party in interest under Section 1 (20) of the Act.

It was decided in *Atchison Ry.* v. *Railroad Com.*, 283 U. S. 380, 393-394, that a city has "a proper interest in the subject matter" entitling it to present an application before the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing interstate railroads entering the city to construct a union passenger terminal, overruling the contention that the carriers alone had sufficient standing to present such an

application. If a city has a sufficient interest to secure a certificate for a terminal within its own boundaries, it would clearly seem to have sufficient interest to oppose a certificate for a competing terminal located in a rival city. The City of Kansas City, Missouri, is, therefore, clearly a party in interest entitled to enjoin the unauthorized construction of the produce terminal in the case at bar. By the stronger reason the other petitioners who are shippers possessing an even more immediate relation to the transportation situation are likewise entitled to maintain a suit for that purpose.

The court below held that although the proposed extension of respondent's line may adversely affect the petitioners' welfare, it will not do so directly but only indirectly and consequentially. Petitioners submit that their welfare will be directly as well as adversely affected, as was held by Judge Stone in his able dissenting opinion in this case.

The injuries to which petitioners will be subjected, according to the allegations of the complaint, were concisely summarized by Judge Stone. He said that the construction and operation of the proposed extension would: (a) destroy or seriously and adversely affect the businesses, properties and large financial investments of plaintiffs in and adjacent to the existing Kansas City, Missouri, produce market; (b) create a rival market far removed from the center of population and inconvenient to a great majority of the citizens of the two cities; (c) create a rival market with no increase of produce business when the present market is entirely adequate to serve the entire community; (d) result in an unnecessary duplication of railroad facilities at a cost of over $500,000 with no increase in freight to be handled; (e) divert traffic to defendant from other railroads which are now adequately

handling the traffic to the existing produce market; (f) cause destructive competition between railroads operating in the vicinity; and (g) result in wasteful and needless expenditures by defendant (R. 41).

The conclusions of the majority below with respect to the indirect and consequential character of the injury seems to be bottomed upon the view that all that defendant Union Pacific Railroad Company is doing is to construct trackage to serve a competing market being constructed by Kansas City, Kansas (R. 35-36). This is a serious misconception of the allegations of the complaint. The allegation is not that Kansas City, Kansas, alone is building the new market but that the Union Pacific and the City are "now engaged in building a so-called 'food terminal' or produce market" (R. 2). Since the railroad and Kansas City, Kansas, are engaged in the construction of terminal facilities for the receipt and distribution of produce, the case is not, as the lower court incorrectly assumed, one where the injury is threatened by the extension of trackage by a railroad to serve an industry built by a third party, but one where the railroad and a third party are joining together in the construction of a terminal for the receipt, sale and distribution of produce moving in interstate commerce. In this view, the participation of the respondent in causing the injuries complained of cannot be other than direct and immediate.

The serious injury which may be inflicted on shippers by the construction and operation of duplicate produce terminals is illustrated by the decision of the District Court below in another case involving this same terminal. *United States* v. *Union Pacific* (1940), 32 F. Supp. 917, 34 F. Supp. 4. As the decisions in that case show, when the District Court denied relief to petitioners, the respondent and the City of Kansas City, Kansas, went ahead with

the construction of the new food terminal including the necessary trackage. As one means of promoting the success of the new terminal they formulated a deliberate plan to destroy the market in Kansas City, Missouri, in which petitioners are financially interested; and as one means of consummating this plan they attempted to move the produce center of Greater Kansas City to their terminal by offering monetary payments and other concessions to the more important or influential shippers to induce them to move to the new location. While the lower court in the case cited enjoined this particular method of carrying out the plan to destroy the business and property of the petitioners, the threat of achieving the same end by other methods of operating the new terminal is an ever-present danger to these petitioners.

Despite the pendency of this suit, the respondent has proceeded with the construction and operation of the produce terminal facilities including the railroad trackage. This does not render the case moot for the reasons stated by this court in a parallel case *Texas, Etc., R. R.* v. *Northside Ry.*, 276 U. S. 475, 479.

> "Paragraph 20 of Sec. 402 specifically provides that unauthorized operation as well as construction may be enjoined. Moreover, the facts erroneously found would not, if true, have rendered the case moot. For where a defendant, with notice of the filing of a bill for an injunction, proceeds to complete the acts sought to be enjoined, the court may, by mandatory injunction, compel a restoration of the *status quo*."

The Interstate Commerce Act is, in general, highly remedial legislation, and the intention of Congress to provide all parties injured as a result of its violation with a remedy is evidenced throughout. We think it is evident

that Congress had no intention of departing from that policy in the provisions of the Transportation Act here under consideration.

In *Piedmont & Northern R. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, this court said at pages 311-312:

> "The Transportation Act was remedial legislation, and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended."

That policy should be given effect in construing the statutory provisions involved in the instant case.

If petitioners are not parties in interest within the meaning of paragraph (20) of Section 1, they are without remedy under the Act. They may not complain to the Interstate Commerce Commission, for it has no power to enjoin unauthorized construction or operation of a line. The statute makes suit for injunction in the District Court the exclusive remedy. *Texas & Pacific Ry. Co.* v. *Gulf, etc., Ry. Co.,* 270 U. S. 266. In that case the court said at page 273:

> "• • • A party in interest who is opposed to the construction is not authorized by the Act to initiate before the Commission any proceeding concerning the project. If application for a certificate has been made, he may appear there in opposition. If no such application has been made, paragraph 20 affords him the only remedy. That remedy is both affirmative and complete."

This Court also held in *Powell* v. *United States,* 300 U. S. 276, that the question as to the right of a railroad

to construct or operate a track without first securing a certificate cannot be raised by instituting a proceeding before the Commission under other provisions of the Interstate Commerce Act. The Court said (l. c. 288):

> "Plainly, the Central (Central of Georgia Railway Company) mistook its remedy. By its complaint against the tariff is sought an order of the Commission equivalent to a decree of court in a suit under Section 1 (20) enjoining the Seaboard from extending its service because contrary to Section 1 (18). The order, as construed and supported by appellees, is the practical equivalent of such a decree. The governing statutory provisions do not permit substitution of the Commission's order for a decree of court."

and (p. 289):

> "The statutes cannot be construed to give the Commission, a carrier or other party seeking to enforce Section 1 (18) a choice of remedies; i. e., between a proceeding before the Commission to invalidate the applicable tariff and a suit under Section 1 (20). The latter is exclusive."

Since shippers injured by an unauthorized extension have no other remedy, and since it cannot be that Congress intended shippers injured as a result of such an unlawful act should be without remedy, it is apparent that Congress meant to include them among the parties in interest who, under paragraph (20) of Section 1, are entitled to maintain a suit in a District Court to enjoin an unlawful extension of service.

In considering whether petitioners are parties in interest within the meaning of the statute, the allegations of the complaint must be accepted as true and every presumption resolved in favor of the sufficiency of the plead-

ing. Under such construction of the complaint and under the decisions heretofore cited, petitioners clearly are parties in interest under the statute and are authorized to institute and maintain this action.

2. The complaint states a claim upon which relief can be granted.

We believe we have shown under Point I that the petitioners are "parties in interest" within the meaning of the Act and are entitled to bring and maintain this action. That being true, the complaint states a cause of action upon which relief can be granted. Surely the complaint amply meets the requirements of the new rules of civil procedure for District Courts and states a cause of action entitling petitioners to have the case heard on its merits. To reach a contrary conclusion it is necessary either to disregard the allegations of the complaint or to hold as a matter of law that a shipper cannot be adversely affected by a material change in a transportation situation vital to his economic survival.

Conclusion.

It is clear from the foregoing that if the allegations in the complaint are true (and for the purpose of respondent's application to hear and determine certain defenses in advance of trial they must be accepted as true) the respondent is attempting to extend its tracks in violation of law. The one-half million dollars respondent is expending for tracks and the three million dollars for bonds, all are a part of the same plan. A part of the three million dollars will be spent for tracks to be built by the city of Kansas City, Kansas, but all of this trackage petitioners allege and respondent admits is to be operated by

respondent. The extent, length, connections and total cost of this trackage and respondent's investment in *revenue* bonds, are all important in determining whether this is an extension and its effect upon the welfare of petitioners. All of this is a matter of proof, which petitioners should be permitted to adduce at the trial.

Without a single decision holding that a shipper cannot be among those whose welfare may be directly and adversely affected by a carrier's unauthorized action bringing about some material change in vital transportation and in the light of the broad language of paragraph 20, Section 1, of the Interstate Commerce Act to the effect that any construction "* * * contrary to the provisions of this paragraph may be enjoined by any court of competent jurisdiction at the suit of * * * any party in interest * * *," how can it be said that it clearly appears on the face of the complaint that petitioners cannot adduce sufficient evidence at the trial to support their allegations that said extensions "will directly and adversely affect the property interests of the plaintiffs and the public generally by bringing about a material change in the transportation situation, and will constitute an unnecessary burden upon interstate commerce directly and adversely affecting the welfare of plaintiffs and the public interest"?

Summarizing, we respectfully urge with all the earnestness of which we are capable:

(1) Congress meant by the term "any party in interest" to include not only any one who might maintain an action in the absence of statute but also any one, whether carrier or shipper or municipal corporation, who has an interest in fact in the immediate transportation situation which would be adversely affected by the extension of a line of railroad.

(2) The primary purpose of the Interstate Commerce Act is the protection of shippers, and to construe the term "any party in interest" as not including shippers whose competitive position would be adversely affected by an extension of line and who are interested in or affected by the immediate transportation situation would be contrary to that purpose.

(3) Shippers and a city immediately interested in a transportation situation are directly affected within the purview of the statute as they are directly affected in fact by the construction of competitive terminal facilities in a rival city.

(4) Petitioners are parties in interest and authorized and entitled to institute and maintain this action under the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act.

(5) The complaint states a claim upon which relief can be granted.

We further urge that the opinion and judgment of the court below should be reversed so that the petitioners may be permitted to offer proof of their interest and to show in what respects and to what extent their welfare may be adversely affected by the unlawful extension of respondent's lines of railroad.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1940.

No. 34.

L. Singer & Sons et al., *Petitioners*,

vs.

Union Pacific Railroad Company, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

I.

STATEMENT.

Both petitioners and respondent have already filed their briefs in this case. The purpose of this brief is to reply to some of the more important arguments made by the respondent.

II.

Term "party in interest" is not confined to person having cause of action independent of statute.

One of the principal, if not the principal, arguments of respondent is that Congress, in providing in Section 1 (20) of the Interstate Commerce Act, 49 U. S. C. A. 1 (20), for a suit by "any party in interest" to enjoin illegal construction or operation, intended to describe only a person who has a cause of action under the general principles of the law as previously laid down by the courts independent of statute (Respondent's brief, pp. 10-21). So construed, the statute is merely declaratory of the law existing before it was passed, and would bring in no new group of persons entitled to enjoin wasteful and destructive competition.

The conclusive answer to this contention is found in respondent's own brief. "Prior to the enactment of the Transportation Act 1920, even a rail carrier could not complain of honest competition" (Respondent's brief, page 26). But since the passage of the statute a rail carrier may maintain an action because it has had "conferred upon it the right to be free from unauthorized competition" (*Id.*, pp. 38-39). So, also, of a company chartered to build a railroad (*Id.*, pp. 39-40) of a ferry company. (*Id.*, pp. 42-43), and of the owner of land sought to be condemned for the new line (*Id.*, p. 42).

Respondent does not seem to realize the implications of the admissions it has made in its own argument. If the provisions of Section 1 (20) serve to confer a right of action where previously there was none, then the term "party in interest" is not confined to the description of a party with a cause of action under general principles of law irrespective of statute, but has a broader scope.

It necessarily confers a right of action where none before existed.

The admissions in respondent's brief which inevitably led to this conclusion are not accidental or inadvertent. They are not made voluntarily by the respondents, but are compelled by decisions of this Court which it cannot ignore. This Court, as well as other federal courts, has declared that, in the absence of statutory permission, unauthorized competition may not be enjoined. *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464; *Edward Hines, Trustees* v. *United States*, 263 U. S. 143; *West Tennessee Power & Light Co.* v. *City of Jackson*, 97 Fed. (2d) 979; *Carolina Power & Light Co.* v. *South Carolina Public Service Authority*, 94 Fed. (2d) 520; *Railroad* v. *Ellerman*, 105 U. S. 166. Similarly, it has decided, in cases which do not involve the slightest conflict, that, by virtue of the provisions of Section 1 (18-22) a suit to enjoin unauthorized competition in the railroad field may be maintained by a competing rail carrier, *Texas & Pacific Railway Co.* v. *Gulf, Colorado & Santa Fe Railway Co.*, 270 U. S. 266; *Western Pacific* v. *Southern Pacific Co.*, 284 U. S. 47, or by a competing ferry, *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, 391.

In deciding cases in the second group, this Court went to considerable pains to make it perfectly clear that the cause of action under Section 1 (20) is entirely statutory in origin. Thus, it said in *Western Pacific* v. *Southern Pacific*, 284 U. S. 47, 51-52:

> "Prior to the statute, it could not have maintained such a suit, since the competitor's proposed action did not threaten interference with any legal right. No carrier could then demand exemption from honest competition.

"If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See *Massachusetts* v. *Mellon*, 262 U. S. 447, 488. It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation. Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened. It alleged the beginning of an unlawful undertaking by a carrier which might prove deleterious to it as well as to the public interest in securing and maintaining proper railroad service without undue loss."

The court could not have been more specific than when it said in *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, 391:

"The right of appellant Ferry Company to institute and maintain this proceeding *rests wholly upon the permission granted by paragraph 20, §1.* 'Any party in interest' may institute a suit to enjoin proposed construction, operation, or abandonment of a carrier's line unless it has obtained a certificate of public convenience and necessity from the Interstate Commerce Commission." (Italics ours.)

The respondent's difficulty is attributable to its failure to distinguish the two groups of cases. It fails to recognize that the cases in the first group, which it erroneously regards as controlling in its favor, deal entirely with the application of the ordinary rule governing the right to sue, in the absence of statute, and cannot be controlling or persuasive or even in point, where, as here, the ordinary rule has been changed by statute.

The only case in the first group which arose under the Interstate Commerce Act is *Edward Hines, Trustees* v. *United States,* (1923) 263 U. S. 143. Concededly, it did not arise under Section 1 (20). It is cited by respondent as a judicial definition of the phrase "party in interest" and more specifically as holding that the term "any party or parties in interest to the proceedings before the Commission," employed in Section 45a, Title 28, U. S. C. A., does not include one whose competitive position has been injured but only one who has suffered legal injury under ordinary principles of law. Respondent is mistaken and the case does not so hold. The phrase "any party or parties in interest," etc., is not mentioned in the opinion and was not involved because, as the court said—contrary to the view entertained by the respondent —"the plaintiffs had not been parties to the proceedings before the Commission" (263 U. S. 144).

III.

Statutory right of action not limited to carriers but extends to all persons whose welfare is directly and adversely affected.

Respondent contends that since the only parties who have successfully maintained an action in the limited number of suits for injunction that have been brought under Section 1 (20) have been a rail carrier, a company

organized to operate as a rail carrier, a carrier by ferry, and a person whose land is sought to be condemned, they are the only persons embraced within the scope of the phrase "party in interest" appearing in the statute (Respondent's brief, p. 28). This is a plain *non sequitur*. It ignores the generality of the phrase "any party in interest." This language is not restricted to persons engaged in any particular occupation, such as the operation of a railroad or a ferry, but extends to any person no matter what his occupation whose welfare may be directly and adversely affected by the unlawful construction or operation prohibited by the statute. "It will suffice, we think," this Court said in *Western Pacific* v. *Southern Pacific Co.*, 284 U. S. 47, 51, "if the unauthorized and therefore unlawful action of the defendant carrier *may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation.*" (Italics ours.)

The Circuit Court of Appeals expressly held in the case at bar (R. 38) that complainants' welfare would be adversely affected, and it cannot be denied that the construction of the new produce terminal will, under the allegations of the complaint, bring about some material change in the transportation situation. The only remaining question, therefore, is whether the unlawful action may directly affect the petitioners' welfare.

IV.

Petitioners' welfare will be directly affected.

Respondent contends that the injury to the petitioning produce dealers under the allegations of the complaint is indirect rather than direct and the remote rather than the proximate result of the respondent's unlawful action

(Respondent's brief, page 40); and that petitioners complain not of any injury to themselves, but on account of injury to railroads in competition with the respondent (*Id.*, pp. 19-21). But these contentions not only reflect a misapprehension of the allegations respecting the effect of the unauthorized construction on competing railroads, but more importantly they also entirely ignore other allegations respecting other forms of injury which will be visited solely on the petitioners.

First. The complaint sets forth in detail how the unauthorized extension would result in needless and wasteful expenditures by the respondent and would cause destructive competition between the respondent and other railroad companies (R. 3, 4). The injury resulting from such wasteful and uneconomical practices is visited not alone upon the railroads, but also upon the shippers who are dependent upon them for service, since such practices inevitably result in higher rates or poorer service, or both, and shippers such as the petitioners bear the burden. The objective of the statute is to put an end to these practices, and one of the methods contemplated by the statute for securing this objective is an injunction suit by any party in interest—by any one with a real interest in fact in the transportation situation threatened with an unauthorized and illegal disturbance.

Second. An analysis of the complaint will show that it contains allegations of specific injury to petitioners alone. Petitioners are engaged in buying and selling produce at the terminal market in Kansas City, Missouri (R. 1). It is alleged that the respondent Union Pacific and the City of Kansas City, Kansas, are together "now engaged in building a so-called 'food terminal' or produce market" (R. 2). This unnecessary and wasteful duplication of existing facilities will destroy or seriously

and adversely affect the property, businesses, and investments of the petitioners in the Missouri terminal (R. 3). It "will directly and adversely affect the property interests of the plaintiffs and the public generally by bringing about a material change in the transportation situation, and will constitute an unnecessary burden upon interstate commerce directly and adversely affecting the welfare of plaintiffs and the public interest" (R. 4).

Coupled with the other averments, these allegations are sufficient under Rule 8 of the new Federal Rules of Civil Procedure to meet the requirements of "a short and plain statement of the claim showing that the pleader is entitled to relief." Under them petitioners will be able to offer proof of the facts in support of the allegations of direct injury flowing from the acts of the respondent. They will be able to prove that the respondent Union Pacific itself deliberately set out to destroy the market in which they are financially interested. The District Court, in another case arising out of the respondent's activities in the construction and operation of the new Kansas City Food Terminal, *United States* v. *Union Pacific R. Co.*, 32 F. Supp. 915, 921, summed the facts up as follows:

> "The Union Pacific, DeOreo and Fean, and the City all realized early that a division of the wholesale business between the existing market and the one proposed would be fatal to the success of both. It was therefore planned by the Union Pacific and other interested parties that the produce dealers located at the Missouri market would be induced to move to the new market. * * * The efforts of the representatives of the Union Pacific and the City to meet and counteract the opposition to the plan to move the Missouri dealers to the new market were directed by the Union Pacific."

The theory advanced by the respondent to the effect that the injury to petitioners is caused by competition from other produce dealers is a defensive fiction. The allegations of the complaint are that the injury will be caused by the acts of the respondent, and it would be inadmissible to assume that these allegations are idle or incapable of proof. They must be taken as admitted in considering the defenses advanced by the respondent which are the equivalent of a motion to dismiss.

While the Kansas City Food Terminal of respondent consists of two integral parts: (1) railroad facilities and (2) market facilities (R. 2, 3), it constitutes an inseparable whole. The two parts combine to make the terminal, and the presence of both is essential to the existence of the terminal. There would be no market facilities in the absence of railroad trackage and no railroad trackage in the absence of the market facilities. The market facilities jointly constructed by the respondent and the City and forming an inseparable part of the terminal are in direct competition with the market facilities owned by the petitioners at the Missouri terminal. But for the construction and operation of the Kansas terminal as a whole by the respondent, this injury to the business, property and investment of the petitioners would not occur, and there is no intervening, independent agency to break the chain of causation or to render the acts of the respondent indirect or remote in a legal sense.

It will not do to say that the damage to petitioners arises from the competition they suffer from produce dealers located at the new food terminal. Some of the damage arises from another cause: the duplication of the facilities owned by the petitioners at the Missouri market. Another part of the damage is, in a certain sense, caused by competition from the dealers at the new terminal, but

the intervention of their competition is not an independent, intervening cause but one set in motion by the original wrongful act of the respondent in constructing and operating the unauthorized extension of its line. 22 R. C. L. 134.

The test to be applied in determining what is a direct cause of injury in a case of this kind should be no stricter than in determining what is the proximate cause in a case of negligence. The acts of the respondent are the natural and probable cause of the injury which the petitioners have suffered. 22 R. C. L. 113, 118-128.

Where a territory is adequately served by existing railroads, the effect of the construction of an additional line is not to increase production or consumption, but to divide the already existing business. The company promoting the new line, in order to build up traffic for its profitable operation, is inevitably led into a campaign to induce all or a part of the dealers in the goods produced or consumed to locate their plants or warehouses on the new line. Some may be men previously in business along the lines of existing railroads, while others may be persons engaging in the business for the first time. The wasteful and destructive competition extends to the dealers. Plants and warehouses are duplicated and the field becomes overcrowded. In this way the natural and probable consequence of the construction of an unneeded new line is to injure the business and the property of those in business along the already existing railroad.

Petitioners do not contend that any one and every one may bring suit under Section 1 (20). They do believe, however, that any one who is directly interested in the specific transportation situation and who suffers definitely ascertainable pecuniary injury by an unauthorized exten-

sion of line which brings about a change in the situation, is entitled to maintain such an action.

In *Western Pacific* v. *Southern Pacific Co.*, 284 U. S. 47, this Court held that a company organized to operate as a rail carrier in a particular territory could maintain an action to prevent another railroad from making an unauthorized extension into such territory, because "the petitioner was peculiarly concerned. Its own welfare was seriously threatened." By saying that the petitioner's welfare was seriously threatened, the Court obviously referred, not as respondent suggests, to a threat to its legal rights, but to a threat to its financial interests which form the basis of the injury giving rise to the legal rights.

Petitioners here are in a strictly analogous situation. They are peculiarly concerned. Their own welfare is seriously threatened by the illegal acts of the respondents. This is as undoubtedly true as a matter of substance in the one case as in the other. The petitioners are parties in interest in point of fact, and nothing more is necessary to be shown in order to make them parties in interest under the statute, so as to be entitled to the protection which it is designed to afford.

Petitioners are shippers who are as directly and immediately affected by the wasteful duplication of terminal facilities at Kansas City as any shippers could be in any transportation situation subject to change by the construction of competing facilities. The Interstate Commerce Act "was passed for the protection of those who pay or bear the rates." *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 638. The purpose of Section 1 (18-22) is "not primarily to protect the railroad but to protect interstate commerce from undue burdens or discrimination." *Colorado* v. *United States*, 271 U. S. 153, 162. And this is but another way of saying that the

primary purpose of these provisions was to protect the shippers who carry on the interstate commerce. There is not the slightest indication of a legislative intention to exclude shippers from the exercise of the remedy created by Section 1 (20). The term "any party in interest" is clearly on its face broad enough to include an interested shipper as well as an interested carrier. The shipper cannot be excluded without interpreting the broad and general language contrary to the known intention of Congress, not only in passing the Interstate Commerce Act as a whole but in enacting the particular paragraph with which we are here concerned.

Conclusion.

Petitioners respectfully submit that they are parties in interest who are authorized under the provisions of Section 1 (20) of the Interstate Commerce Act to institute and maintain this action.

Respectfully submitted,

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No. [redacted]

In the

Supreme Court of the United States

October Term, 1939.

L. SINGER & SONS, a Corporation, *et al.*, *Petitioners*,

vs.

UNION PACIFIC RAILROAD COMPANY, a Corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In the

Supreme Court of the United States

October Term, 1939.

L. SINGER & SONS, a Corporation, *et al.*, *Petitioners*,

vs.

UNION PACIFIC RAILROAD COMPANY, a Corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

No. 825.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 109 Fed. (2d) 493. The opinion of the District Court for the Western District of Missouri is reported in 26 Fed. Supp. 721.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioners' Complaint.

Petitioners allege that they were engaged in the business of buying and selling fruits and vegetables at wholesale in the City Market located in Kansas City, Missouri, which was an old and well established market, having suitable and adequate transportation facilities of all kinds; that respondent was a common carrier by railroad, having its eastern terminus in the City of Kansas City, Kansas, where that city and respondent were engaged in building a food terminal or produce market on a tract owned by the latter city; that respondent was building tracks to the Kansas City, Kansas, Market, but it had not obtained from the Interstate Commerce Commission a certificate of public convenience and necessity (R. 4) authorizing such construction, as required by paragraph (18), Section 1, Transportation Act, 1920 (Title 49, U. S. C. A., Sec. 1, par. [18]). None of the petitioners are carriers whose territory is or will be invaded by reason of the proposed construction. Petitioners invoke paragraph (20) of Section 1, Transportation Act, 1920 (Title 49, U. S. C. A., Sec. 1, par. [20]), which in substance provides that "any construction, operation or abandonment contrary to the provisions of this paragraph or of paragraph (18) * * * may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the state or states affected, or any party in interest. * * *" Petitioners contend that they are parties in interest within the meaning of paragraph (20) and are hence entitled to maintain the suit because the construction of the trackage in Kansas City, Kansas, by respondent will:

(a) Destroy or seriously affect the business in which petitioners are engaged at the Kansas City, Missouri, market, and their property devoted thereto;

(b) Create a rival market in Kansas City, Kansas, inconvenient to a great majority of citizens;

(c) Create a rival market without producing additional produce to be handled therein, in that the market in Kansas City, Missouri, is adequate to serve both Kansas City, Missouri, and Kansas City, Kansas;

(d) Result in unnecessary duplication of railroad facilities at a cost of more than $500,000.00;

(e) Divert traffic to respondent from other railroads;

(f) Cause destructive competition between defendant and other railroads; and

(g) Result in wasteful and needless expenditure of money by respondent (R. 4).

Petitioners contend that because of these grounds they were entitled to relief against respondent under paragraph (20), Section 1, Transportation Act, 1920, enjoining it from constructing the tracks in question because of the failure of respondent to procure a certificate of convenience and necessity authorizing such construction as required by paragraph (18), Section 1, Transportation Act, 1920 (R. 5).

Respondent's Answer.

In its answer respondent, among other defenses, asserted that the complaint failed to state any facts upon which relief could be granted, in that petitioners were not parties in interest within the meaning of paragraph (20), Section 1, of Transportation Act, 1920, who were authorized to maintain the suit (R. 20-22). The District

Court upon a hearing in advance of trial, as prescribed by Rule 12 of the Federal Rules of Civil Procedure, held that petitioners were not parties in interest within the meaning and purview of paragraph (20) and entered its decree dismissing the complaint because it did not allege facts upon which any relief could be granted.

Intervention of the City of Kansas City, Mo.

The City of Kansas City, Mo., filed a motion to intervene, asserting its public and other alleged interest in the action (R. 5—). The ruling of the District Court denying the motion because the City was not a party in interest, 26 Fed. Supp. 721, was affirmed by the Court of Appeals, 109 Fed. (2d) 493. A petition for certiorari, No. 826, has been filed by the City from that ruling and response to that petition will be made in that case.

The Statutes Involved.

Petitioners averred in their complaint that respondent had failed to secure a certificate of public convenience and necessity for the construction of the trackage, as required by paragraph (18), Section 1, of the Transportation Act, 1920, which provides as follows:

> "(18) No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad or the construction of a new line of railroad, or shall acquire any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation,

of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Petitioners contend that because of the failure of respondent to secure a certificate of public convenience and necessity they were parties in interest who were authorized to maintain the action under paragraph (20) of Section 1, Transportation Act, 1920, which provides as follows:

"(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance or the certificate such terms and conditions as in its judgment the public convenience and necessity may require. * * * carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed * * *. Any construction, operation or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commissioner or regulating body of the State or States affected, or any party in interest; * * *."

Summary of Opinion of Circuit Court of Appeals.

The Court of Appeals held that petitioners were not parties in interest within the meaning of paragraph (20) who could maintain the action. It predicated its decision

upon the rulings of this Court in *Western Pacific* v. *Southern Pacific Co.*, 284 U. S. 47, and *Texas & Pac. R. Co.* v. *Gulf-Colorado & Santa Fe R. Co.*, 270 U. S. 266. It held that although petitioners' welfare may be affected because of competitive conditions which might ensue in the produce business and because of a material change being brought about in the transportation situation due to the construction of the alleged extension, yet petitioners had no right to complain because the complaint discloses that their welfare cannot be directly, but only indirectly and inconsequentially affected by the alleged extension (109 Fed. [2d] l. c. 496). The Court of Appeals pointed out that petitioners' welfare could not be directly affected by the proposed extension because they are not in competition with respondent and are not engaged in the transportation business. Their concern was the effect upon their business of changes which might be brought about because of the construction of the competitive food terminal enterprise. The Court of Appeals held that petitioners had not sustained any legal injury which would give them the right to complain (l. c. 496), and, accordingly, affirmed the decree of the District Court dismissing the complaint.

THE PETITION FOR CERTIORARI.

Summarily petitioners contend that certiorari should be granted by this Court for the reasons:

(1) The decision of the Court of Appeals is in conflict with the decisions of this Court in *Western Pacific* v. *Southern Pacific,* 284 U. S. 47; and *Texas & Pac.* v. *Gulf-Colorado & Santa Fe,* 270 U. S. 266; and

(2) That the interpretation of "party in interest" is an important question which this Court should determine and answer.

REASONS RELIED ON FOR DENIAL OF CERTIORARI.

Respondent contends that the petition for certiorari should be denied on the following grounds:

(1) The holding of this Court in *Western Pacific* v. *Southern Pacific, supra,* that a carrier whose welfare might be directly affected could maintain an action under paragraph (20), Section 1, Transportation Act of 1920, to enjoin a competing carrier from invading its territory, and the holding of this Court in *Texas & Pacific Railway Company* v. *Gulf-Colorado & Santa Fe Railway Company, supra,* to the same effect, were expressly followed by the Circuit Court of Appeals in its decision below and no conflict is presented; and

(2) The question as to who may maintain an action as a party in interest both generally and under the statute in question has been settled by a long line of decisions of this Court and needs no further exposition or interpretation by this Court in this case.

ARGUMENT.

I.

The holding of this Court in *Western Pacific v. Southern Pacific, supra,* that a carrier whose welfare might be directly affected could maintain an action under paragraph (20), Section 1, Transportation Act of 1920, to enjoin a competing carrier from invading its territory, and the holding of this Court in *Texas & Pacific Railway Company v. Gulf-Colorado & Santa Fe Railway Company, supra,* to the same effect, were expressly followed by the Circuit Court of Appeals in its decision below and no conflict is presented.

Petitioners unsuccessfully urged in both the District Court and the Circuit Court of Appeals that because their welfare might be adversely affected on account of the competition engendered by the construction of the Kansas City, Kansas, market and the tracks in question serving the same, they were parties in interest within the purview of paragraph (20), and hence were authorized to maintain the suit. They are not common carriers whose territory will be invaded by the proposed track construction. They point out no legal right created by the Act which has been threatened or violated by respondent. They say that all that is necessary to bring them in as a party interest is that their welfare may be adversely affected. Petitioners claim that the ruling of this Court in *Western Pacific* v. *Southern Pacific, supra,* supported this contention, but a consideration of the facts in that case and the ruling of this Court clearly demonstrates that the decision has no such scope or effect. In that case the Western Pacific

had applied to the Interstate Commerce Commission for a certificate of convenience and necessity authorizing it to construct a railroad into a territory contiguous to that then served by it. During the pendency of the proceedings before the Commission the Southern Pacific commenced the construction of a rail line into the same territory proposed to be served by the Western Pacific as specified in its application to the Commission. The Western Pacific brought proceedings to enjoin under paragraph (20) on the ground that its territory was to be invaded and the proposed construction by the Southern Pacific had not been authorized by the Commission. It was asserted by the Southern Pacific that the Western Pacific was a mere paper railroad and hence was not authorized to maintain the action. It was pointed out, however, that the application filed by the Western Pacific with the Commission was the first step it could take in order to secure authority to construct the track and the location of its line had already been fixed by surveys. In response to that contention, this Court ruled that the welfare of the Western Pacific was directly affected by the proposed construction.

The basis of the decision is apparent. It was that the territory of the Western Pacific was to be invaded by a competitor by unauthorized competition. This Court had previously ruled in *Texas & Pacific Railway Company* v. *Gulf-Colorado & Santa Fe Railway Company, supra,* that prior to the enactment of the Transportation Act, 1920, *no carrier* could claim exemption from honest competition. That Act conferred a right on an interested carrier to be exempt from unauthorized competition and consequently a carrier whose territory was to be invaded by another carrier through unauthorized competition was a party in interest whose right created by the Transportation Act,

1920, had been violated or *directly* threatened and could consequently enjoin such unauthorized competition.[1]

This Court in *Western Pacific* v. *Southern Pacific, supra,* evinced no purpose to depart from the decision in *Texas & Pac. Ry. Co.* v. *Gulf-Colorado & Santa Fe Railway Co., supra,* or other cases where the same rule has been applied. It is manifest that if anyone other than a carrier whose welfare might be adversely affected, as petitioners contend, could maintain an action under paragraph (20), then the plain language and historical purpose of the Transportation Act must be ignored.

In the enactment of the Transportation Act, 1920, the dominant objective of Congress was the maintenance and preservation of an adequate and efficient national transportation service in the public interest. At the time of the passage of this Act the railroads of the country had just been returned to private ownership from government operation during the World war. Congress realized that if a national transportation system was to be maintained, extensions of railroads or acquisition of railroads by

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[1]The Court of Appeals in its decision herein expressly followed the *Western Pacific case* and quoted profusely from the opinion, saying further at l. c. 495-6:

"It seems equally obvious that, except for the fact that the proposed extension is essential to the operation of the rival market in Kansas, it could not possibly have any direct or immediate effect upon the plaintiffs, their property or their business in Missouri, other than the effect which a wasteful expenditure by the defendant of its money would have upon the public generally. The proximate cause of the injury to the plaintiffs will be the competition created by the construction and operation of the rival market, and not the construction or operation of the transportation facilities furnished to it by the defendant or by others engaged in the transportation business.

"* * * * * * * * *

"We are of the opinion, however, that their complaint discloses that their welfare cannot be directly, but only indirectly and inconsequentially, affected by the proposed extension. They are not in competition with the defendant. They are not engaged in the transportation business. Their only peculiar interest in that business is in the effect which changes in it may have upon the market where they do business and upon rival markets now or hereafter established in the territory which the plaintiffs serve."

carriers should be regulated, because improvident expenditures for such purposes might seriously impair the financial ability of the carriers to maintain essential transportation services.[2]

Hence, the Interstate Commerce Commission was the agency selected to control and regulate carriers in the extension of their railroads or the acquisition of new railroads. Public convenience and necessity was to control the judgment of the Commission in applications for authority. Penalties were prescribed for violations (par. 18, Sec. 1) and the civil remedy of a right to enjoin was conferred by paragraph (20) (see *Powell* v. *United States*, 300 U. S. 276). The United States, the Interstate Commerce Commission, any regulatory body of the state or states affected, and any party in interest might secure such injunctive relief. The public interest in the protection of the transportation system is the dominant idea of the enactment and the agencies delegated with the duty of enforcing civil remedies conferred by paragraph (20) are the United States, the Interstate Commerce Commission, and any regulatory body of the state or states affected.

Petitioners complain that traffic will be diverted from other railroads to respondent; that respondent is making an improvident expenditure for the construction of the tracks in question, and that a material change in the transportation system will occur. In the main these are all matters which affect public interest which may be asserted by those charged by Congress with the duty of protecting public interest and not by private individuals. The paragraph was not construed by this Court in *Western Pacific* v. *Southern Pacific, supra,* or in any other case, as giving to a private citizen the right to advocate the cause of the public.

[2] *St. Louis Southwestern Ry. Co.* v. *Missouri Pacific Ry. Co.*, 289 U. S. 76, and *California R. Com.* v. *Southern Pac. Co.*, 264 U. S. 331.

Conceivably the damage that will result to other railroads, as asserted by petitioners, is one that might be claimed by a competing railroad who would suffer such diversion because of the competition between the markets (see *Texas & Pac. Ry. Co.* v. *Gulf-Colorado & Santa Fe Ry. Co., supra*), but petitioners will no more be heard to advocate the cause of a competing railroad than they will be to espouse public right under the avowed purpose of law enforcement.

We submit that this Court in *Western Pacific* v. *Southern Pacific, supra,* did not either expressly or inferentially hold that anyone who might assert his welfare may be adversely affected could avail himself of the remedy to enjoin as prescribed by paragraph (20).[3] This is so not only because the language of the opinion considered in the light of the questions before the Court is not susceptible of such construction, but also that such construction would do violence to the legislative purpose for the enactment of the Transportation Act, 1920. *Western Pacific* v. *Southern Pacific, supra,* is in consonance with the other decisions of this Court dealing with the right of an interested carrier to enjoin unauthorized competition and was given full effect by the Court of Appeals in its decision of this case.

[3]This court expressly held at l. c. 51: "On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law." The court held that it would suffice "if the bill discloses some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may *directly* and adversely affect the complainant's welfare by bringing about some material change in the transportation system." (Italics ours.)

II.

The question as to who may maintain an action as a party in interest has been settled by a long line of decisions of this Court and needs no further exposition or interpretation by this Court in this case.

Petitioners assert that they are parties in interest and therefore are authorized to maintain the action because their welfare may be adversely affected due to competition which will result on account of the construction of the Kansas City, Kansas, market. They point to no statute, contract or other basis of legal right which they claim entitles them to freedom from competition. In short, they assert no *direct* legal injury. They merely claim an indirect injury because their welfare may be affected. From this, they argue that they are parties in interest.

That petitioners are not parties in interest is established by the ruling of this Court in *Alabama Power Company* v. *Ickes*, 302 U. S. 464, in which an electric power company operating in Alabama sued to enjoin the performance of agreements made with the Federal Emergency Administration of Public Works to make loans and grants of money to assist several Alabama municipalities in constructing an electrical distribution system on the ground that the loans and grants were unlawful and that, the federal statute authorizing such loans and grants was unconstitutional. It was asserted by the power company that the construction of the municipal electric light plants with the proceeds derived from the loan and grant agreements would produce destructive competition which would result in financial loss to the plaintiff. This Court held that the plaintiff was not a party in interest who could raise the validity of the loan agreements or the statutes under which the Federal Administrator acted because plaintiff's legal right was not violated through

the construction of the competing facilities, even though its business may be destroyed as a result of such competition.

The principles of this case were restated by this Court in *Tennessee Electric Power Company* v. *Tennessee Valley Authority,* 306 U. S. 118. This case was brought by public utility companies engaged in the business of generating, transmitting and distributing electricity, most of them having local franchises, licenses or easements granted by the municipalities, to enjoin the Tennessee Valley Authority from generating electricity and from transmitting, distributing or selling the electricity so distributed in competition with the plaintiffs. Plaintiffs contended that the defendant Authority was acting in violation of the Federal Constitution and that competition would inflict substantial direct damage upon them. The defendant admitted the damage thus claimed would result but asserted that such damage was not consequent upon the violation of any legal right recognized by law. This Court sustained defendant's contention upon the same principle announced by it in *Alabama Power Company* v. *Ickes, supra.* In the latter case this Court followed *Railroad Company* v. *Ellerman,* 105 U. S. 166. In that case the railroad company was authorized by its charter to acquire, manage, use and enjoy wharves and their appurtenances in connection with its railroad. A Louisiana statute conferred upon the railroad power to obtain and use wharves connected with and incidental to the railroad. The railroad company acquired property which it used as a wharf and which in contravention to the statute and its charter it leased to certain persons. Ellerman operated public wharves under a contract with the City of New Orleans which gave him the right to collect revenues derived from such operations. He brought suit to enjoin the execution of the lease by the railroad company. The court held he

was not a party in interest who could raise the question of the usurpation of corporate power by the railroad company because it was apparent that his only interest was to prevent competition with himself as a wharfinger which the more extensive and challenged use by the lessees of the railroad wharf would create. This Court said that even though it would be conceded that the plaintiff would sustain damage because of such use by competing wharfingers that nevertheless such damage was indirect and remote and that such damage was not consequent upon a legal injury and therefore the plaintiff could not maintain the suit.

Petitioners claim that they are parties in interest because of diversion of traffic from other railroads to respondent and because the construction of the proposed rail facilities would be a duplication and therefore wasteful. These are matters which are of no concern to petitioners. These are matters which conceivably might be complained of by the government, the Interstate Commerce Commission or the regulating body of the State of Kansas where the tracks are to be constructed, or by a competing carrier whose territory was to be invaded by the proposed construction. But petitioners cannot seek to maintain the action merely because possibly someone else whose legal right is affected could maintain it. This Court recognized this principle in *Interstate Commerce Commission* v. *Chicago, Rock Island and Pacific Ry. Co.*, 218 U. S. 88, 109, where it held that it was the established rule of this Court not to "listen to a party who complains of a grievance which is not his" as he cannot be heard to object merely because of injury to others. The courts of appeal have applied the same rule in the following cases:

Arkansas-Missouri Power Co. v. *City of Kennett,* 78 Fed. (2d) 911 (C. C. A. 8th);
United States ex rel. New York Warehouse, Wharf & Terminal Ass'n v. *Dern, Secretary of War,* 68 Fed. (2d) 773 (D. C. App.);
Carolina Power & Light Co. v. *South Carolina Public Service Authority,* (C. C. A. 4th) 94 Fed. (2d) 520;
West Tennessee Power & Light Co. v. *City of Jackson,* (C. C. A. 6th) 97 Fed. (2d) 979.

This Court in *Edward Hines, Yellow Pine Trustee, et al.* v. *United States,* 263 U. S. 143, applied this principle. In that case plaintiff, who was engaged in the lumber business, brought a suit to enjoin the order of the Interstate Commerce Commission abolishing a so-called penalty charge of $10.00 per car per day on lumber held at reconsignment points. Plaintiffs claimed they were damaged by the order because they shipped direct to their own yards without reconsignment and because of the penalty charge they enjoyed advantages over lumber jobbers who were subject to the reconsignment charge. The order annulling the reconsignment charge destroyed this advantage and upon this act plaintiffs asserted legal injury forming the basis of their right to maintain the action. This Court held that the asserted damage did not arise as a result of a legal injury and that consequently plaintiffs have shown no interest which entitles them to sue.

Under the cases decided by this Court, before one may institute an action as a party in interest he must demonstrate that his legal right is directly menaced. As to railroad companies whose territory is to be invaded and as to the federal government, the Interstate Commerce Commission or any state commission involving the public interest, those rights are created by a transportation act of 1920.

A consideration of the cases cited in the footnote, page 82, in *St. Louis Southwestern Ry. Co.* v. *Missouri Pacific R. R. Co.*, 289 U. S. 82, will disclose that all the cases under paragraph 20 have been brought by a railroad company whose territory was sought to be invaded by a proposed extension except two cases wherein a party whose lands were to be appropriated by condemnation for the purpose of constructing an extension of a railroad in violation of paragraph 18. The right of a landowner to enjoin was discussed in *Texas, etc., R. Co.* v. *North Side Ry. Co.*, 276 U. S. 476. This Court ruled in that case that a landowner whose land is to be appropriated for the construction of a railroad is such a party in interest who may challenge the authority of the railroad company to proceed with the construction on the ground that it had not obtained a certificate of convenience and necessity, as required by paragraph 18. To the same effect is *Smyth, et al.* v. *Asphalt Belt Ry. Co.*, 267 U. S. 326.

But these cases do not in any way aid petitioners because they do not claim to be landowners whose property is being appropriated for use in connection with the construction of the proposed tracks.

From the foregoing decisions and many others which could be cited, it is plain that petitioners are not parties in interest who could maintain this suit and that the decision of the Court of Appeals in so holding is in full accord with such decisions.

Conclusion.

It is respectfully submitted that the certiorari should be denied for the following reasons:

(1) The decision of the Circuit Court of Appeals followed the decisions of this Court in *Western Pacific* v. *Southern Pacific, supra; Texas and Pacific Ry. Co.* v. *Gulf, Colorado and Santa Fe Ry. Co., supra,* and other decisions of this Court in holding that petitioners were not parties in interest who could maintain this suit, and

(2) The question as to who is a party in interest who may maintain an action has been fully settled by a long line of decisions of this Court and needs no further exposition or consideration in this case.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1940.

No. 34.

L. Stenger & Sons et al., *Petitioners*,

vs.

Union Pacific Railroad Company, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

RESPONDENT'S BRIEF.



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SMITH-GRAETER LAW PRINTING, KANSAS CITY, MO.

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In the

Supreme Court of the United States

October Term, 1940.

No. 34.

L. SINGER & SONS ET AL., *Petitioners,*

vs.

UNION PACIFIC RAILROAD COMPANY, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

RESPONDENT'S BRIEF.

I.

THE OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit appears in the record beginning at page 33 and is reported in 109 F. [2d] 493. The opinion of the District Court for the Western District of Missouri appears in the record at page 25 and is reported in 26 F. Supp. 721.

II.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT WAS INVOKED.

This cause is before this Court upon writ of certiorari issued by this Court to the United States Circuit Court of Appeals for the Eighth Circuit, under authority of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1939 (C 229, 43 Stat. 936, 28 U. S. C. A. 347).

III.

THE STATUTES INVOLVED.

As authority for maintaining this suit petitioners invoked paragraph 20, Section 1, of the Transportation Act 1920 (41 Stat., Section 478, 49 U. S. C. A., paragraph 20, Section 1) which, in part, provides that

> "the United States, the commission, any commission or regulating body of the State or States affected or any party in interest"

may enjoin an extension or abandonment of a railroad where a certificate of convenience and necessity shall not have been obtained therefor from the Interstate Commerce Commission as required by paragraph 18, Section 1, Transportation Act 1920 (41 Stat., Section 477, 49 U. S. C. A., paragraph 18, Section 1) (R. 3). These paragraphs are set forth in full in the appendix to this brief.

IV.

STATEMENT OF THE CASE.

Nature of the Case.

This suit was brought under paragraphs 18 to 20, Section 1, Transportation Act 1920 by petitioners, some of whom are produce merchants engaged in business at the Kansas City, Missouri, market and some of whom are owners of real estate appurtenant to that market, against respondent as a common carrier by railroad, to enjoin it from constructing an alleged extension to its railroad which will serve a market being built by the city of Kansas City, Kansas, in that city (R. 1, 4-5). Petitioners claim that they are "parties in interest" within the meaning of paragraph 20, Section 1, of the Act and hence are authorized to maintain this action. Respondent's defense that the complaint fails to state a claim against respondent upon which relief can be granted because petitioners did not aver in their complaint any legal injury to them resulting from the violation of a legal duty owing them by respondent was sustained by both the Circuit Court of Appeals (R. 33; 109 Fed. [2d] 493) and the District Court (R. 25; 26 Fed. Supp. 721).

The question presented for decision by this Court is whether paragraph 18, Section 1, of the Transportation Act 1920, providing that no carrier by railroad shall extend its railroad until after it has secured a certificate of public convenience and necessity therefor from the Interstate Commerce Commission, created a legal right in favor of petitioners as produce merchants and owners of real estate because of damage to their business and property as asserted by them in their complaint, and

whether petitioners are "parties in interest" who may, under paragraph 20 of Section 1 of the Act, maintain this suit against respondent to enjoin an alleged violation of paragraph 18.

The Complaint.

It is averred in the complaint that plaintiffs are engaged in the business of buying and selling, at wholesale and retail, fruits, vegetables and other products within and adjacent to the City Market in Kansas City, Missouri, and that in the transaction of such business, fruits, vegetables and other perishable foods are shipped to and from the territory adjacent to Kansas City, Missouri (R. 1-2); that the city of Kansas City, Missouri, is now engaged in the construction in said city of a new wholesale and retail market consisting of buildings and facilities costing approximately $500,000.00; that the Kansas City, Missouri, market has been served for a long period of time by transportation facilities which are convenient and adequate to meet the needs of the market (R. 2).

It is alleged that the city of Kansas City, Kansas, is engaged in building a food market on a tract of land located in and owned by that city costing approximately $4,000,000.00, the funds for the construction of which were provided by a grant from the Public Works Administration of the United States of $1,710,000.00, and from proceeds derived from the sale to respondent of Public Levy Terminal Revenue Bonds issued by that city in the principal amount of $3,000,000.00 (R. 2); that respondent has entered into a lease with the city of Kansas City, Kansas, under which it rented a tract of land contiguous to the proposed market, containing approximate-

ly 25 acres and that it has obligated itself to construct or operate a track or tracks to serve the Kansas City, Kansas, market (R. 2-3).

It is averred by way of conclusion only and not by allegation of any fact that such tracks constitute extensions within the purview of paragraphs 18 to 21 of Section 1 of the Transportation Act 1920 and that respondent has not obtained a certificate of convenience and necessity authorizing the construction of the tracks (R. 3).

Summarily, petitioners asserted that the construction of the tracks would:

(a) Seriously destroy or adversely affect the businesses and properties of petitioners and the large investments of money made in and adjacent to the Kansas City, Missouri, market;

(b) Create a rival market at a location far removed from the center of population of the community of Kansas City, Missouri, and inconvenient to a great majority of the citizens of Greater Kansas City;

(c) Create a rival market without producing additional produce to be handled or additional consumers to be served when the present Kansas City, Missouri, market has adequate facilities and is capable of serving the community;

(d) Result in an unnecessary duplication of railroad facilities;

(e) Divert traffic to respondent from other railroad companies which have adequate facilities and are now handling the traffic in the Kansas City, Missouri, produce market;

(f) Cause destructive competition between respondent and other railroad companies operating in the vicinity;

(g) Result in wasteful and needless expenditure of money by respondent (Par. 8 of the Complaint, R. 3-4).

Petitioners alleged by way of conclusion that the construction and operation of the tracks at the Kansas City produce market would adversely affect their property interests and the public generally by bringing about a material change in the transportation situation, without any averment or charge as to what change would be brought about or what the transportation situation is; that the construction of the tracks will constitute an unnecessary burden upon interstate commerce directly affecting the welfare of petitioners and the public interest (R. 4). Petitioners prayed that respondent be enjoined and restrained from constructing the tracks until such time as it had applied for and secured a certificate of convenience and necessity from the Interstate Commerce Commission (R. 4-5).

Respondent's Answer.

Among others, respondent interposed the following defenses to the complaint:

(a) That petitioners are not parties in interest under paragraph 20, Section 1, of the Transportation Act 1920, and are not authorized to institute or maintain this action thereunder (R. 18);

(b) The complaint fails to state a claim against respondent upon which relief can be granted (R. 19).

The District Court heard and sustained both defenses in advance of trial, as authorized by Rule 12(d) of the Rules of Civil Procedure (R. 23), 26 Fed. Supp. 721, and the Circuit Court of Appeals affirmed (109 Fed. [2d] 493; R. 33, 45-47).

Intervening Petition of the City of Kansas City, Missouri.

The city of Kansas City, Missouri, filed a motion to intervene (R. 5), to which was attached an intervening petition (R. 11) asserting as grounds therefor all of the allegations contained in petitioners' complaint. The District Court denied the City's motion (R. 22-23) and the Circuit Court of Appeals affirmed (R. 33, 40, 45-47), 109 Fed. (2d) 493. No discussion of that ruling is made in this brief because a petition for certiorari was granted by this Court upon application therefor by the city of Kansas City, Missouri, to the Circuit Court of Appeals and is on the docket of this Court as Case No. 35. Respondent is responding in a separate brief in that case. However, because many of petitioner's contentions in that case are the same as the petitioners' in the instant case, respondent has served petitioner with its brief in this case so as to eliminate needless repetition on identical argument and authorities in both cases in respondent's briefs. In fact, both cases constitute one case and should be so heard, but because of the separate appeals to the Circuit Court of Appeals and the separate writs of certiorari that were issued by this Court the cases have not been treated as one in their presentation.

SUMMARY OF THE ARGUMENT.

1. The decision of the Court of Appeals should be affirmed because the complaint discloses no legal injury sustained by petitioners, because:

(a) Petitioners have no legal right to be free from competition;

(b) Petitioners may neither complain of competition which will ensue among rail carriers, nor as to whether the trackage is an extension of respondent's line as alleged by them; and

(c) No legal right was created in favor of petitioners, under paragraphs 18 and 20, Section 1 of the Transportation Act 1920 respecting the injury as alleged in the complaint.

2. Petitioners' contention that paragraph 20, Section 1, of the Transportation Act, when construed in *pari materia* with the Interstate Commerce Act, shows that Congress by the use of the term "any party in interest" in paragraph 20, Section 1, of the Act, intended to confer the right thereby created on any person claiming damage is untenable.

3. Merely because they claim to be shippers, petitioners are not parties in interest under the allegations of their complaint and cannot maintain the action.

4. *Western Pacific* v. *Southern Pacific Co.*, 284 U. S. 47, and other cases cited by petitioners, do not sustain their claim that they are parties in interest who may maintain the action.

V.

ARGUMENT.

The decision of the Court of Appeals must be affirmed because the complaint discloses no legal injury sustained by petitioner.

(A) Petitioners have no legal right to be free from competition.

Before one may be a "party in interest" he must assert the violation of a legal duty owing by the defendant to him. If no legal duty is owed him or if the defendant owes a legal duty to someone other than the plaintiff, he is not a "party in interest," although he may have been damaged. This is because of the principle of *damnum absque injuria* applied by the courts as the test in determining whether one who institutes an action is a "party in interest." Petitioners seek to invoke the remedy of injunction provided by paragraph 20, Section 1, of the Transportation Act 1920, the pertinent portion of which is:

> "* * * Any construction * * * contrary to the provisions of this paragraph or of paragraphs (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; * * *."

It is the claim of petitioners that they come within the designation of "any party in interest" and may, therefore, maintain the suit. An analysis of the complaint discloses that no legal right of petitioners has been violated or threatened because of the alleged extension

of the railroad. In brief, it is petitioners' claim, as alleged in their complaint, that their business and property will be damaged because of the construction of the Kansas City, Kansas, market by the city of Kansas City, Kansas, and respondent and by the construction of the tracks by respondent. The tracks in question are only a facility which will serve the market. Without the market there would be no purpose in constructing the tracks and without the market there could be no damage to petitioners. Petitioners charge in paragraph 8 of their complaint (R. 3-4) that because of the construction of the market that:

> (a) There will be an injury to the business and properties of plaintiffs and others in the Kansas City, Missouri, produce market;
> (b) There will be the creation of a rival market on a barren, sandy tract dedicated as a public levy;
> (c) There will be the creation of a rival market without producing additional produce to be handled therein.

In their brief in this Court (pp. 18-19) petitioners still seek to maintain their chief complaint made in both courts below, that the operation of the Kansas City, Kansas, market will result in damage to them. Therefore, the damage of which petitioners complain is the damage which they will sustain to their business and property because of the Kansas City, Kansas, market. There is no statute, Federal or State, cited by petitioners, as a basis of any legal right of theirs, to be immune from competition. Anyone having funds and the inclination could engage in the fruit and vegetable business in Kansas City, Kansas, or elsewhere without violating any legal right of petitioners which would be actionable.

Even assuming damage to petitioners' business because of the competition made possible by the Kansas City,

Kansas, market, this gives petitioners no right to complain because the operation of the competing market violates no legal rights of the petitioners. Therefore, petitioners' claim that they come within the definition of a "party in interest" within the meaning of paragraph 20 of Section 1 will not be seriously considered because there is no wrong committed by respondent or anyone else in building and developing a competitive enterprise which directly results in the violation of a legal right of petitioners. The rules determining who is a "party in interest" were gone into comprehensively and applied by this Court in *Alabama Power Co.* v. *Ickes*, 302 U. S. 464. In that case an electric power company, operating in Alabama, sued to enjoin the performance of agreements made with the Federal Emergency Administrator of Public Works to make loans and grants of money to assist several Alabama municipalities in constructing an electrical distribution system, on the ground that the loans and grants were unlawful and that the Federal statute authorizing such loans and grants was unconstitutional. It was asserted by the Power Company that the construction of the municipal electric light plants with the proceeds derived from the loan and grant agreements would produce destructive competition to plaintiff whereby it would sustain financial loss. This Court held that the plaintiff was not a party in interest who could raise the question of the validity of the grant and loan agreements or the constitutionality of the statute granting authority to make the same. This Court stated that before an injury could form the basis of an action, there must be a wrong which directly results in the violation of a legal right. This Court cited the following ancient maxim of the law, l. c. 479:

> "An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without any injury in this sense, (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain. * * * Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action."

This Court immediately followed with the statement, applicable to the instant case, l. c. 479, that:

> "The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained."

This Court, speaking of the injury to plaintiff because of the competition which would result in the construction of the rival municipal plants, said, l. c. 479-80:

> "The claim that petitioner will be injured, perhaps ruined, by the competition of the municipalities brought about by the use of the moneys, therefore, presents a clear case of *damnum absque injuria.* Stated in other words, these municipalities have the right under state law to engage in the business in competition with petitioner, since it has been given no exclusive franchise. If its business be curtailed or destroyed by the operations of the municipalities, it will be by lawful competition from which no legal wrong results."

Petitioners point to no statute or other basis of a legal right giving them the exclusive franchise to engage in the produce business in Missouri or elsewhere. Therefore,

they may not complain because of damages asserted to have been sustained by them on account of the creation and operation of the competitive enterprise in Kansas City, Kansas.

Again, this Court in *Edward Hines Yellow Pine Trustees* v. *United States*, 263 U. S. 143, held that a showing of legal injury must be made before a party could maintain an action therefor. In that case the plaintiffs, engaged in the lumber business, brought a suit to enjoin an order of the Commission abolishing a penalty charge of $10.00 per day on lumber held at reconsignment points. Plaintiffs claimed that they were damaged by the order because they shipped direct to their own yards without reconsignment and because of the penalty charge they enjoyed advantages over lumber jobbers who were subject to the reconsignment charge. The order annulling this charge destroyed the advantage enjoyed by the plaintiffs and upon this account they asserted legal injury as the basis of their right to maintain the action under Section 45a, Title 28, U. S. C. A., which authorizes "any party or parties in interest to the proceedings before the Commission" to appear as parties in a suit challenging the orders of the Commission. This Court said, l. c. 148:

> "They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do. * * * Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition."

This Court, in *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118, again applied the principle of *damnum absque injuria* where complaint was

made that a power project constructed by the Tennessee Valley Authority would provide destructive competition and cause damage to plaintiffs' business. It was charged that the project of the Tennessee Valley Authority would result in the establishment of municipal and cooperative distributing systems competing with the plaintiffs in the territory which they now served and which they asserted would inflict substantial damage upon them. The defendants admitted the damage would result, but contended that such damage could not be the basis of a cause of action since it was a damage not consequent upon the violation of any right recognized by law. This Court held that inasmuch as the plaintiffs had no legal right to be free from competition they could not challenge the validity of the statutes under which the competition was to be instituted. This Court said, l. c. 140:

> "If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is *ultra vires*, that there is a defect in the grant of powers to it, or that the means of competition were acquired by some violation of the Constitution. The contention is foreclosed by prior decisions that the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue."

See also *Carolina Power & Light Co.* v. *South Carolina Public Service Authority*, 94 F. (2d) 520 (C. C. A. 4); *West Tennessee Power & Light Co.* v. *City of Jackson*, 97 F. (2d) 979 (C. C. A. 6).

It therefore conclusively appears that assuming damage will result to petitioners on account of the construction of the market and the tracks appurtenant thereto because of the competition that will thereby ensue, petitioners

have no legal right to be free from competition and they are therefore not parties in interest who may maintain the action.

(B) Petitioners may neither complain of competition which will ensue among rail carriers, nor as to whether the trackage is an extension of respondent's line as alleged by them.

Petitioners are not engaged in the transportation business. They are not in competition with respondent in the rendition of transportation services in Kansas City, Kansas, or elsewhere and they are not stockholders of respondent. Their sole status, as alleged in the complaint, is that of produce commission merchants engaged in business on the Kansas City, Missouri, market and as the owners of property. Their complaint is that injury will result to someone else. Specifically, they charge in paragraph 8 of the complaint (R. 3-4) that the construction of the tracks will (a) result in an unnecessary duplication of railroad facilities; (b) divert traffic to respondent from other railroad companies which have adequate facilities and are now handling the traffic in the Kansas City, Missouri, produce area; (c) cause destructive competition between respondent and other railroad companies operating in the vicinity and (d) result in wasteful and needless expenditures of money by respondent.

Being neither carriers in competition with respondent nor stockholders of respondent, then if there is no legal duty owing by respondent to petitioners not to engage in destructive competition with other railroad companies or to refrain from making wasteful and needless expenditures of money, as we will demonstrate, then petitioners are not concerned in any degree insofar as the legal duty of respondent is concerned with the distribution of

traffic or revenues of railroads, nor whether respondent is proceeding lawfully or unlawfully in the construction of the tracks in question. Concerning this they can have no complaint. Such was the holding of this Court in *Alabama Power Co.* v. *Ickes, supra,* l. c. 481, where this Court gave the following hypothetical example of the application of this principle:

> "John Doe, let us suppose, is engaged in operating a grocery store. Richard Roe, desiring to open a rival and competing establishment, seeks a loan from a manufacturing concern which, under its charter, is without authority to make the loan. The loan, if made, will be *ultra vires.* The state or a stockholder of the corporation, perhaps a creditor in some circumstances, may, upon that ground, enjoin the loan. But may it be enjoined at the suit of John Doe, a stranger to the corporation, because the lawful use of the money will prove injurious to him and this result is foreseen and expected both by the lender and the borrower, Richard Roe? Certainly not, unless we are prepared to lay down the general rule that A, who will suffer damage from the lawful act of B, and who plainly will have no case against B, may nevertheless invoke judicial aid to restrain a third party, acting without authority, from furnishing means which will enable B to do what the law permits him to do. Such a rule would be opposed to sound reason, as we have already tried to show, and cannot be accepted."

This Court cited *Railroad* v. *Ellerman,* 105 U. S. 166, where this principle had been discussed. In that case the railroad company was authorized by its charter to acquire, manage and enjoy wharves and their appurtenances in connection with its railroad. The railroad company acquired property which it used as a wharf and in contravention of its charter and of a statute of the State

of Louisiana, it leased to certain persons for the mooring of vessels and the loading and unloading of cargoes upon and from vessels of a kind designated. Ellerman, the plaintiff, operated public wharves under a contract with the city of New Orleans which gave him the right to collect revenues derived from such operations. He brought suit to enjoin the execution of the lease by the railroad. The court held he was not such a party in interest as could maintain the suit, because it was apparent that his only interest was to prevent competition with himself as a wharfinger, which the more extensive and challenged use by the lessees of the railroad wharf would create. His claim for relief was based upon the ground that the use of the wharves, as proposed by the lease, contravened the Louisiana statute and the charter of the railroad. In denying his claim, this Court said, l. c. 173-174:

> "But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires?* The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for anyone to compete with the company, although the latter may not be authorized to engage in the same business. The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. * * * The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such

right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed."

Under these principles, stated by this Court, it is incumbent upon petitioners to show that wasteful competition between respondent and other railroads, as alleged in their complaint, violates some legal duty owing them by respondent because of the statutes in question. As pointed out in the cases *supra*, the mere fact that respondent may have violated paragraph 18 of Section 1 of the Transportation Act 1920 in building an alleged unlawful extension of its line of railroad would give petitioners no more cause for complaint than if respondent was proceeding to do some *ultra vires* act or some act in violation of some other statute which created no legal right in their favor. If, as established by the cases *supra*, petitioners cannot complain of the effect of lawful competition upon their own business, clearly they cannot complain that the expenditures involved in constructing the tracks is improvident, unwise or wasteful. The damage in such case would be suffered by stockholders. Neither could petitioners complain of the effect upon carriers competing with respondent. That petitioners may not complain of a grievance which is not theirs is definitely settled by decisions of this Court.

In *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, the railroad company complained of an order of the Commission reducing revenues, because of the effect upon shippers. This Court said it would not hear such a complaint. It said, l. c. 109:

> "That the companies may complain of the reduction made by the Commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his."

This Court quoted with approval the following from its decision in *Smiley* v. *Kansas*, 196 U. S. 447, l. c. 457:

> "He cannot be heard to object to the statute merely because it operates oppressively upon others. The hurt must be to himself. The case, under appellant's contention as to this point, is not a case of favoritism in the law. It is not a case of exclusion of classes who ought to have been included, the leaving out of which constitutes a denial of the equal protection of the law, but it is the opposite of that. It is a case of the inclusion of those who ought to have been excluded. Hence, unless appellant can show that he himself has been wrongfully included in the terms of the law, he can have no just ground of complaint. This is fundamental and decisively settled."

See also:

Edward Hines Yellow Pine Trustees v. *United States, supra.*

The affirmative allegations of the complaint make it clear that petitioners are attempting to assert a cause of action for the alleged violation of a statute which is of no concern of theirs. This seems too plain for argument when the affirmative allegations of the complaint are considered. Petitioners have shown no legal concern in wasteful and needless expenditures of money by respondent. Not being engaged in the transportation business and not being a carrier affected, we can apprehend

no legal damage to petitioners because of the asserted diversion of traffic from other railroads to respondent. For the same reason, no legal injury results to petitioners because of the alleged duplication of railroad facilities and the destructive competition between railroads. Even a railroad carrier would have no standing as a party in interest unless the unauthorized competition injured it. None of petitioners' traffic is being diverted and in the construction of the alleged extension, respondent has not invaded any territory served by petitioners as rail carriers. Petitioners have therefore by the allegations of their complaint shown that they have no right to challenge the action of respondent in this case as to whether the trackage in question is an extension of respondent's line. For these reasons, it is respectfully submitted that the claims of petitioners are *damnum absque injuria* and they cannot maintain the action.

(C) No legal right was created in favor of petitioners under paragraphs 18 and 20, Section 1, of the Transportation Act 1920 respecting the injury as alleged in the complaint.

Petitioners concede in their brief, page 10, that, in the absence of paragraphs 18 and 20 of Section 1, they would have no right to complain, but they argue that such sections created a legal right in petitioners to complain (a) of the construction and operation of the "rival" market in Kansas City, Kansas, with the tracks in question; (b) of the diversion of traffic to respondent from other railroads; (c) of the wasteful expenditure of money by respondent, and (d) of the duplication of rail facilities by respondent bringing about competition with other railroads. The question, therefore, is whether paragraphs 18 and 20 of Section 1 of the Transportation Act 1920 conferred upon petitioners any legal right for the viola-

tion of which these asserted claims of damage are actionable. The pertinent portion of paragraph 18, Section 1, which petitioners assert as the basis of their right, is:

> "*Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, * * * unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require * * * the construction * * * of such * * * extended line of railroad * * *."

They invoke the remedy of injunction conferred by paragraph 20 of Section 1 of the Act, the pertinent portion of which is:

> "* * * Any construction * * * contrary to the provisions of this paragraph or of paragraphs (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; * * *."

Notwithstanding petitioners' concession that their right to maintain this action must be found in these sections of the act, the long line of decisions by which this Court has defined who may be a party in interest entitled to maintain an action has definite application here.

Under commonly accepted rules of statutory construction, Congress is presumed to have intended the designation, "party in interest," in paragraph 20 to be interpreted in accordance with its long established meaning as shown by the decisions of this Court.

The only contention by which petitioners seek to avoid

the application of this definition of "party in interest" is the assertion that the aims and objects of paragraphs 18 to 22 of Section 1 will be defeated unless a different and enlarged meaning be given to said statutory phrase.

Since each of the cases cited *supra* in which this Court has interpreted and applied the same term dealt with the effort of a litigant to avoid by judicial proceedings the effect of lawful competition, it is clear that before a broader application of the term "party in interest" may be made there must be found in the statutory scheme embraced in paragraphs 18 to 22 of Section 1 some purpose to accord to those in the petitioners' alleged situation some right, conditional or otherwise, to be free from that competition.

There is nothing in any Congressional Committee Reports and nothing written in any decided case that Congress intended to protect produce commission merchants from competition brought about by the construction of a rival market. There is nothing in the Committee Reports and no language in the paragraphs from which it could be said with any reason that Congress intended to grant immunity from competition to produce merchants. In the enactment of the Transportation Act 1920, Congress gave no consideration to any evils which existed because of competition between produce merchants. Its concern was the promotion and preservation of railroad transportation in the public interest.

If Congress intended to create a right in merchants to be freed from competition by other merchants, the effect would be to abrogate the public policy of the common law and repeal the statutory law of the United States, such as the anti-trust laws, both of which are to encourage such competition. If such a revolutionary change had been intended, Congress would have plainly said so. It

would not have left the expression of such an important change lurking in the mere words "any party in interest." It would not have allowed the line of demarkation between those who could and those who could not invoke the Act to be worked out through many years of litigation.

Such being the case, and petitioners claim for such immunity being based on paragraphs 18 to 20 of Section 1 of the Act, petitioners will not be heard to complain on the grounds alleged in the complaint because of damage to their property and business which will be brought about by the operation of the "rival" market, or the tracks in question. Obviously, petitioners' asserted claim for damage from competition on account of the rival market is *damnum absque injuria* and they will not be heard on that account in this case to complain as to whether respondent has or has not violated paragraph 18 in the construction of the alleged extension.

Petitioners are not carriers by railroad who might suffer from the competition brought about by the construction of the alleged extension or the diversion of traffic from other railroads. Petitioners may not place themselves in the position of a competing railroad company whose territory has been invaded and consequently whose legal right, conferred by the Transportation Act 1920 to be free from unauthorized competition, has been invaded. Petitioners may not complain of the asserted damage and injury that will be caused to someone else. *Edward Hines Yellow Pine Trustees* v. *United States, supra; Alabama Power Co.* v. *Ickes, supra; Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Railway Co., supra; Smiley* v. *Kansas, supra.* For the same reason, petitioners may not complain of the wasteful and needless expenditures of money by respondent in the construc-

tion of the alleged railroad extension. They do not occupy the position of stockholders whose rights are to be affected.

Petitioners make no charge that their transportation services will be impaired. They assert no direct injury that will result to them because of the alleged extension.

When the aims and objectives of Congress in enacting the Transportation Act 1920 are considered, it is plain that no legal rights such as are asserted by petitioners in their complaint, were conferred upon them by paragraph 18.

This Court has stated that it was the objective of Congress, in enacting the Transportation Act 1920, to promote the development and maintenance of transportation facilities by railroads. In *Texas & Pacific Railway Co.* v. *Gulf, Colorado & Santa Fe Railway Co.*, 270 U. S. 266, l. c. 277-278, this Court said (italics ours):

> "It [Congress] recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; *that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss.* See *Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *The Chicago Junction Case*, 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331."

This Court makes it clear that Congress recognized that the building of needless extensions by railroads was

wasteful and would result in substantial impairment of the carriers' ability to render adequate transportation services to the public. Particular emphasis was laid by this Court upon the injury inflicted by a carrier on its rival which adversely affected the public interest.

No one could contend with any logic that it was the objective of Congress, in enacting the Transportation Act 1920, to limit or curtail competition between produce merchants. The avowed purpose, as stated by this Court in *Texas & Pacific Railway Co.* v. *Gulf, Colorado & Santa Fe Ry. Co., supra,* was to eliminate wasteful competition between railroads and thereby eradicate the evils which stood in the way of the promotion and maintenance of railroad transportation service by the rail carriers.

Prior to the enactment of the Transportation Act 1920, even a rail carrier could not complain of honest competition. This Court, in *Western Pacific* v. *Southern Pacific Co.,* 284 U. S. 47, pointed out that the Transportation Act 1920 conferred upon a carrier a new and substantial right of not being subjected to new competition unless found to be in the public interest. Wasteful competition by a rival carrier not only might be prejudicial to the carrier affected by the competition and thus impair its ability to render service, but also the public interest might be adversely affected. Speaking of the holding in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co., supra,* this Court said, l. c. 51 (italics ours):

> "The Texas & Pacific Ry. sought to prevent an unauthorized competitor from building an extension into territory already served by it. *Prior to the statute, it could not have maintained such a suit, since the competitor's proposed action did not threaten interference with any legal right.* No carrier could then demand exemption from honest competition."

It, therefore, clearly appears that it was the dominant purpose of the Transportation Act 1920 to promote the public interest and in so doing to afford "exemption" to a carrier from unauthorized competition brought about by extensions not found to be in the public interest.

This Court, in *St. Louis Southwestern Ry. Co.* v. *Missouri Pacific Railroad Co.*, 289 U. S. 76, held that the Transportation Act 1920 conferred upon an "interstate carrier" the right not to be subjected to competition unless it was found to be in the public interest. The effect of the Act, insofar as the legal right of an interstate carrier is concerned, is thus stated by the Court, l. c. 81-82 (italics ours):

> *"Transportation Act, 1920, which confers upon an interested carrier the right not to be subjected to such new competition unless it is found to be in the public interest, prescribes the remedy for the protection of that right."*

A consideration of the cases cited in the footnote, page 82, *St. Louis Southwestern Ry. Co.* v. *Missouri Pacific Railroad Co.*, *supra*, discloses that all of those cases except two were brought by an interested carrier whose territory would be invaded by a proposed extension. The two exceptions are *Texas, etc., R. R. Co.* v. *Northside Belt Ry. Co.*, 276 U. S. 475, where a landowner whose land was to be appropriated for the construction of a railroad, challenged the authority of the railroad company to proceed with the construction on the ground that it had not obtained a certificate of convenience and necessity as required by paragraph 18. A landowner whose property is to be taken against his will by a railroad company through the exercise of the power of eminent domain

may rightfully insist that the railroad company, before it can condemn, must show that it has met the requirements of the law and is lawfully authorized to condemn the property. Paragraph 18 requires that the carrier must obtain a certificate of convenience and necessity and if it does not procure such certificate, then it is not authorized to acquire land to construct an unlawful extension and any landowner whose land was to be condemned under such circumstances could invoke the protection of paragraph 18 by injunction under paragraph 20. To the same effect is *Smyth* v. *Asphalt Belt Ry. Co.*, 267 U. S. 326, cited in the footnote.

In the more than twenty years since the enactment of the Transportation Act, neither this Court nor any other court, in any reported case which we have been able to find, has held that paragraphs 18 and 20 created a legal right in favor of produce merchants, landlords or those engaged in the manufacturing or mercantile business to enjoin the construction of an extension of a railroad because of an injury to the business and property of such persons or the creation of a competitive rival enterprise which will affect their business. Except the two condemnation cases referred to, and another condemnation case cited by petitioners (p. 16 of Petitioners' Brief, *Detroit & M. Ry. Co.* v. *Boyne City G. & A. R. Co.*, 286 Fed. 540), to which attention will be later called, all of the cases have been brought either by a public agency designated by the statute or by a competing railroad.

The language of the statute construed in the light of the aims and the objectives of Congress in its enactment conclusively shows that no legal right was conferred upon petitioners to complain of an alleged violation of paragraph 18, Section 1 of the Act for the reasons stated in the complaint. The principle of *damnum absque injuria*,

as stated by this Court, applies and petitioners should not be heard on any alleged violation by respondent of paragraph 18.

Petitioners' contention that paragraph 20 must be construed in *pari materia* with the Interstate Commerce Act.

Petitioners are driven to the contention that a produce commission merchant or a real estate owner, if perchance he is a shipper, has the right to complain of an alleged violation of paragraph 18. They say that he is a party in interest but do not point out the legal right which has been violated. They argue that paragraphs 18 and 20 should be construed in conjunction with every other part of the Interstate Commerce Act. When so construed they, in substance, contend that paragraph 20 must be read as if the words "any person" were used instead of "any party in interest" as therein set forth. They first direct attention to Chapter 104, Section 9, 24 Stat. 382 (49 U. S. C. A., Section 9). This section provides that:

> "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or her own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter * * *."

This section in no way aids petitioners, for two reasons: (1) the remedy therein created has no application to paragraph 20, because, as pointed out by this Court in *Powell* v. *United States*, 300 U. S. 276, the remedy conferred by that paragraph is exclusive. This Court stated, l. c. 289:

> "The statutes cannot be construed to give the commission, a carrier or other parties seeking to enforce §1 (18) a choice of remedies; *i. e.*, between a proceeding before the commission to invalidate the applicable tariff and a suit under §1 (20). The latter is exclusive."

And, (2) in the enactment of paragraph 20, Congress used the conventional legal terminology of "any party in interest," while in Section 9 it used the terminology "any person or persons claiming to be damaged." Had it been the Congressional purpose to repeal the whole policy of the common law and of the United States respecting who is a "party in interest," Congress would not have used the term "any party in interest" in paragraph 20. It could have expressed the purpose by providing that "any person" might institute the action.

Petitioners next cite Sections 2 and 3 of the Elkins Act, 36 Stat. 1167 (Title 49, U. S. C. A., Sections 42 and 43) which authorize the court in which a civil proceeding is brought to enjoin a common carrier from engaging in the carriage of passengers or freight traffic between given points at less than its published tariffs or from committing discriminations forbidden by law, to make such persons or corporations parties to such action as the court may deem necessary. This section has to do with the enforcement of the Elkins Act so as to prevent rebates and unlawful concessions. It was enacted long prior to paragraphs 18 to 20 of Section 1 and has nothing to do with the enforcement of the later sections. This section of the Elkins Act is no argument that Congress departed from the usual meaning of a "party in interest" in the enactment of paragraphs 18 to 20 of Section 1. These sections authorize only the Attorney General, and only upon request of the Interstate Commerce Commission, to insti-

tute a suit to enforce the observance of the published tariffs. In such a suit the court may make such other persons parties to the suit as it deems necessary, but such other persons may not institute the suit.

Petitioners next cite Section 13, paragraph 1, Title 49, U. S. C. A., in support of their argument that "any party in interest" in paragraph 20, Section 1, should be construed as synonymous with "any person, firm, corporation, company or association," as used in the cited section, which provides that "any person, firm, corporation, company or association, or any mercantile, agricultural or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier * * *" may make a complaint to the Interstate Commerce Commission of anything done or omitted to be done by any common carrier subject to the provisions of the Interstate Commerce Act. Obviously, had Congress intended the all-inclusive designation of natural and artificial persons in Section 13 should constitute the class which could bring suit to enjoin construction and operation of an unauthorized railroad extension, it would have used the same language in both sections, because Section 13(1) was re-enacted in 1920 when paragraph 20 of Section 1 was enacted. Congress, however, did not see fit to use this all-inclusive designation in paragraph 20. Before a person or a corporation may invoke paragraph 20, he, or it, must demonstrate that he, or it, is a "party in interest" whose legal right created by paragraphs 18 to 20 has been violated or threatened.

The radical difference in the description of the parties who may invoke relief under the one statute as compared with such description in the other is conclusive evidence

that there are many persons who may invoke Section 13(1) who may not invoke paragraph 20 of Section 1.

Petitioners next cite Section 20 of Title 49, U. S. C. A. An examination of this section discloses that it throws no light in determining who is a "party in interest."

Section 49 of Title 49 U. S. C. A., cited by petitioners, provides that District Courts:

> "* * * shall have jurisdiction upon the relation of any person or persons, firm, or corporation alleging such violation by a common carrier, of any of the provisions of the preceding chapter, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper * * *."

Here, again, Congress has seen fit to create a right in favor of a shipper so that he may be assured of shipping freight at the same rates and upon the same terms and conditions as are charged by the common carrier for like traffic under similar conditions. Again, Congress did not see fit to employ such a broad designation when it enacted paragraph 20. Had it been the purpose of Congress to include every person, as petitioners contend, then it would not have used the term "any party in interest."

Petitioners next cite Sections 212 and 213 of the Judicial Code as amended, Title 28, U. S. C. A., Section 45(a), which authorizes the intervention by communities, associations, corporations, firms and individuals in any suit wherein is involved the validity of an order or requirement of the Interstate Commerce Commission. The particular language of the section which petitioners cite is:

"* * * that communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; * * *."

But, again, Congress did not see fit to employ this language in the enactment of paragraph 20. This Court, in *Powell* v. *United States,* 300 U. S. 276, held that the remedy provided by Section 1, paragraph 20, was inconsistent with a proceeding brought before the Commission, and a suit to challenge the validity of an order of the Commission. This Court said, l. e. 288-289:

"The remedy provided by §1 (20) is clearly inconsistent with a proceeding before the commission to attain the same end. Suits under that paragraph may not be tried before three judges. Those under the Urgent Deficiencies Act (28 U. S. C., §47) to set aside orders of the commission cannot be tried in any other court."

In *Edward Hines Yellow Pine Trustees* v. *U. S., supra,* plaintiff brought suit under Section 45(a), claiming to be a party in interest within the meaning of that statute, the pertinent part of which provides that:

"* * * the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto * * * in any suit wherein is involved the validity of such order * * * and the interest of such party; * * *."

This Court held that plaintiff might not maintain the suit because the order alleged to be void did not subject plaintiff to legal injury but only benefited plaintiff's competitor and hence, being devoid of such legal interest, plaintiff was not a party in interest within the meaning of the section.

Furthermore, in *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co., supra,* this Court held that a railroad company complaining of an order of the Commission reducing revenues because of its alleged injurious effect upon shippers could not challenge the validity of the order in a suit under Section 45(a) because plaintiff had sustained no legal injury. This Court said that it would not listen to a complaint by a party concerning a grievance that was not his.

It is submitted that the sections of the Interstate Commerce Act cited by petitioners, when construed in *pari materia* with the paragraphs in question, conclusively show that Congress intended that only a "party in interest" as defined by the decisions of this Court, *supra,* might invoke such paragraph 20.

Merely because they are shippers, petitioners are not parties in interest and cannot maintain the action.

The allegations of the complaint affirmatively show that petitioners will not be damaged by the construction and operation of the alleged extension. They do not charge that they will be deprived of transportation services or that the rates for transportation services will be changed. It is significant that the Government, the Interstate Commerce Commission and the Public Service Commissions of the State of Missouri and the State of Kansas, who are charged with the duty of protecting the public interest, do not share petitioners' concern. These

governmental agencies, charged with the duty of regulating rail carriers and enforcing the Interstate Commerce Act and Transportation Act, have brought no suit challenging the right of respondent to build and operate the alleged extension. Neither has a common carrier brought such an action. In the absence of such proper parties to maintain the action, petitioners argue that merely because they are shippers, the Court should hold that they are parties in interest within the meaning of paragraph 20.

Not only do petitioners point to no legal damage that will result to them because of the alleged extension but, as above stated, they affirmatively refute the idea of any damage because of an allegation in the complaint that the transportation facilities at the Kansas City, Missouri, market are "suitable, convenient and adequate to meet the requirements of the market" (R. 2). Petitioners allege:

> "Said market [Kansas City, Missouri, market] is now and for a long period of time has been served by existing transportation facilities of various trunk line railroads, and said existing transportation facilities are suitable, convenient and adequate to meet the requirements of the market. The market is easily accessible to its customers through the facilities of said railroads and also by the use of streets and hard-surfaced highways radiating in every direction therefrom."

It is not charged in the complaint, either expressly or by reasonable inference, that the construction and operation of the alleged extension would deprive petitioners of the "suitable, convenient and adequate" transportation services which they are now receiving from the various trunk line railroads. There is no claim that petitioners will sustain damages on account of increased rates and

it would be absurd to seriously consider such an allegation if made. Before there can be any increase in rates or abandonment of the present adequate service, petitioners could be heard before the Interstate Commerce Commission.

In the instant case, petitioners do not sue to protect any of their rights as shippers. If they are shippers, that fact is purely fortuitous. It has nothing to do with the cause of action which they have attempted to state.

If this Court should hold that anyone who happens to avail himself of the services offered by railroads is a "party in interest" who may complain of the construction and operation of a railroad extension, then the term would be expanded to include "any person," because almost all of those engaged in mercantile, manufacturing and farming activities avail themselves of transportation services by railroads and could institute suits under paragraph 20. Thus the right of a railroad in a given case could never be adjudicated as long as it had a shipper who was inclined to sue. In restricting the remedy to the public agencies designated in the statute and to "any party in interest" the purpose of Congress in obviating such a situation is made plain.

The complaint is not only devoid of any allegation of legal injury to petitioners as shippers but in fact affirmatively negatives any idea of such damage either as to transportation services, rates, or any other damage. We submit that petitioners, as shippers, are not parties in interest within the meaning of paragraph 20 of Section 1. Petitioners' assertion that unless this Court should hold that they are parties in interest would render them without remedy is unsound, because the dominant public interest, which is in the promotion and maintenance of adequate rail facilities, can be preserved by the regu-

latory agencies designated by Congress for such purposes. It is the public interest which is affected when a carrier inflicts injury on its competitor by unlawful competition as this Court held in *Texas & Pacific Railway Co.* v. *Gulf, Colorado, Santa Fe Railway Co., supra.* If no one of the public agencies act, then all of them must be either charged with bad faith or else all of them are convinced that the public interest is not adversely affected and the law is not being violated. Therefore, to say that petitioners are without remedy, entirely overlooks the safeguards set up by Congress in the Act to insure its enforcement and we respectfully submit no legal right in petitioners as shippers is asserted in the complaint.

***Western Pacific v. Southern Pacific Co.*, 284 U. S. 47, and other cases cited by petitioners, do not sustain their claim that they are parties in interest who can maintain the action.**

Petitioners place strong reliance on certain language of this Court in *Western Pacific* v. *Southern Pacific Co., supra,* as a basis for their right to maintain the action as a "party in interest." This language is, l. c. 51-52:

> "It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation."

In connection with this statement this Court, however, made the following observation, l. c. 51:

> "On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding."

To determine the effect of the language of this Court, so strongly relied upon by petitioners, resort must be had to the question presented and decided by this Court in that case. At the time the suit was instituted in the District Court, the Western Pacific had filed an application with the Interstate Commerce Commission, under paragraph 18, to construct an extension of its railroad but at the time the suit was instituted had not commenced construction. The question for decision was whether, its plans at the time being in such an embryonic state, the Western Pacific had any legal right conferred upon it by the Act to be free from unauthorized competition as would permit it to maintain a suit as a "party in interest" under paragraph 20. The Circuit Court of Appeals (46 F. [2] 729) held that because the railroad had not completely materialized at the time the suit was commenced, it was not a party in interest within the meaning of paragraph 20. That court concluded that there was no assurance that the plaintiff railroad would be authorized to complete the project. It said, l. c. 730:

> "On these facts, without more, without a railroad, without a right of way, and without traffic to protect, it sought a permanent injunction enjoining the appellant from building a spur track or extending its line, as the case may be."

When the case came before this Court, the Interstate Commerce Commission had issued its certificate authorizing plaintiff to proceed with the construction of the railroad (170 I. C. C. 183). The question decided by this Court was whether plaintiff's action in filing its application and asserting its intention to construct the extension was an evidence of good faith which would place it in the position of an interstate carrier which had con-

ferred upon it the right to be free from unauthorized competition. This Court held that the disclosures of the bill were adequate to show that plaintiff was acting in good faith and that the acts of the defendant were such that its legal right conferred by the Transportation Act was threatened or violated. This Court said, l. c. 52:

> "The disclosures of the bill were enough to show that the respondent's intended action might directly and seriously affect the project which complainant was undertaking in good faith. There was enough to give the latter the standing of a "party in interest" within intendment of the Act."

Thus, it is made plain that the Western Pacific, as a rail carrier, was seeking to enforce a legal right conferred upon it by the Act to be free from unauthorized competition of a rival carrier which was seeking to invade its territory.

Petitioners make the claim that this Court, by the quoted language, *supra,* page 37 of this brief, held that anyone who alleged that his "welfare" may be directly or adversely affected by bringing about a change in the transportation situation, was a "party in interest." But, again, the general language was qualified by the Court when it indicated its limitations when it said, l. c. 52:

> "Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened."

"Welfare," as there used, we submit, is tantamount to this Court saying that the Western Pacific's legal right to be free from unauthorized competition was threatened because of the proposed extension. If it would be injured by the proposed competition with resulting damage and impairment of its ability to render transportation serv-

ices obviously its "welfare" would be directly and adversely affected and it was in this sense that, we believe, the word was used in that case. This Court in that case treated the Western Pacific the same as if its railroad had been built and was in operation. It had taken the first step by filing an application for a certificate of convenience and necessity with the Interstate Commerce Commission to extend its line, and in this situation this Court in effect held that it was entitled to the benefit of the equities and, therefore, being prior in time was prior in right.

Even casual scrutiny of the opinion of this Court in *Western Pacific* v. *Southern Pacific Co., supra,* therefore, discloses that this Court did not extend the term "any party in interest," as used in paragraph 20, beyond the usual meaning thereof given it by the courts. The decision of this Court merely protected the right which the Western Pacific had sought to obtain by pursuit of the procedure provided by paragraphs 18 and 19, and prevented direct injury to that right by the unauthorized extension of a competing line.

The affirmative allegations of the complaint definitely establish that petitioners complain of no *direct* injury of any kind. Every allegation of injury or damage to them is plainly stated to result only through a process of remote indirection to the accomplishment of which the lawful construction and operation of the competing market is an essential element. Clearly this is not the *direct* injury from the construction of the trackage sought to be enjoined which, even upon petitioners' interpretation of the decision in *Western Pacific* v. *Southern Pacific Co., supra,* is required to entitle petitioners to claim to be a "party in interest."

If petitioners' contention is correct that anyone whose

welfare may be affected because of some nebulous claim of a change being brought about in the transportation situation, may bring a suit to enjoin an extension of a line of railroad, then the ruling of this Court in *Moffat Tunnel League* v. *United States*, 289 U. S. 113, must be ignored. In that case certain voluntary associations, which asserted that their welfare was adversely affected, brought suit against the United States to enjoin the execution of an order of the Interstate Commerce Commission authorizing the Denver, Rio Grande & Western Railroad Company to acquire control of the Moffat road. Section 45a of Title 28 U. S. C. A., under which the suit was instituted, provided that such suit might be brought by "any party or parties in interest in the proceeding before the Commission." The plaintiffs claimed that their general welfare, which was adversely affected, gave them the status of parties in interest who are authorized to maintain the action. The court of three judges (59 F. [2] 760) held that plaintiffs were not parties in interest because they had no legal interest. After assuming that the plaintiffs were capable of suing, that court said, l. c. 764, that:

> "* * * if otherwise capable to sue, they must have a legal right arising from a legal interest, the denial of which inflicts or threatens a legal wrong."

This Court affirmed 289 U. S. 113, where this Court said, l. c. 119 (italics ours):

> "*Their interest is not a legal one.* It is no more than a sentiment, such as may be entertained by members of the public in the territory west of Craig, that the employment of transportation facilities authorized by the Commission will lessen the possibility of construction by a rival of the Rio Grande of an extension of the Moffat to Utah common points."

Certainly the term "party in interest" as used in Section 45a could have no other different meaning than "any party in interest" as used in paragraph 20. If, as this Court points out, in *Moffat Tunnel League* v. *United States, supra,* that the interest of a party must be a legal one before he may institute a suit as a party in interest then, certainly, the same requirement must be made as to paragraph 20 where substantially identical terminology is used.

The other case upon which petitioners strongly rely is *Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.,* 286 F. 540 (D. C., E. D. Mich.), in which a landowner, whose land was sought to be condemned, filed a suit to enjoin construction. Unquestionably, the landowner, whose land the railroad was seeking to appropriate against his will, had the legal right to question the authority of the railroad company to condemn. If the Interstate Commerce Commission had not authorized the extension of the line by the issuance of a certificate of convenience and necessity, then the railroad company obviously could not condemn land. We submit that the landowner would be entitled to enjoin on the ground that the railroad had not secured lawful authority to extend its railroad as a basis of its right to condemn, because of the prohibition contained in paragraph 18.

The case of *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382, cited by petitioners, is in no way different in principle from the other cases which hold that a railroad whose territory is invaded by the unauthorized extension, is a "party in interest" who may enjoin the construction and operation of the extension. Petitioners seem to treat as significantly important that the ferry boat operated approximately twenty miles from the site of the proposed extension. The claim there made

was that the ferry boat owner's territory would be invaded by the proposed extension and, consequently, the owner of the ferry boat was a party in interest who could complain of unauthorized competition. The fact that the ferry operated twenty miles from the proposed extension, together with the other facts in the case, resulted in a decision that a certificate of convenience and necessity was properly granted for the proposed extension.

In *Atchison Ry.* v. *Railroad Commission,* 283 U. S. 380, cited by petitioners, it was held that either the State of California or a city located therein has a proper interest which authorizes it to present an application before the Interstate Commerce Commission for a certificate of convenience and necessity authorizing interstate railroads entering the city to construct a union passenger terminal. This Court was dealing with proper parties before the Interstate Commerce Commission and not with "any party in interest," as that term is used in paragraph 20, Section 1, or any like section. In that case, this Court held that the State of California, under its statutes, or a municipality located therein, had the power to compel railroads to build and maintain a union passenger station but that the Interstate Commerce Commission has no power to compel such action. The railroad resisted the efforts of the state to compel the building of the station. It did not apply to the Interstate Commerce Commission for a certificate of convenience and necessity. This Court held that the Act did not provide that a certificate of convenience and necessity might be granted only upon the petition of the railroad company and, since the absence of such a certificate stood in the way of the state's power to compel the maintenance of the union station, the state, therefore, had authority to apply for the certificate. The question as to who might have enjoined the exten-

sion, had no certificate been issued, was not involved. The power of the state recognized by this Court did not emanate from any Federal statute, but was inherent in the state and had not been taken away by any Federal statute.

We submit petitioners have cited no case which holds that any legal right was conferred on them by paragraphs 18 to 20 of Section 1 of the act. In fact, the cases disclose most emphatically that no such right was created in petitioners.

Conclusion.

We respectfully submit that the decision of the Circuit Court of Appeals for the Eighth Circuit in this case should be affirmed because:

1. No legal right was conferred upon petitioners by paragraphs 18 to 20, Section 1, of the Transportation Act 1920, to have immunity either from the competition which will be brought about by the Kansas City, Kansas, market or the railroad tracks to be operated by respondent serving the same.

2. Petitioners, on the grounds asserted in the complaint, may not complain of duplication of (a) railroad facilities, (b) diversion of traffic to respondent from other railroads, or (c) competition which will be brought about between respondent and other railroads by reason of the construction of the alleged extension because these are all matters peculiarly within the concern of the public agencies designated in paragraph 20, or a competing railroad whose territory is to be invaded and they are not of legal concern to petitioners.

3. The allegations of the complaint affirmatively show that petitioners assert no legal right conferred upon them

by paragraphs 18 to 20 of Section 1 of the Transportation Act 1920, which has been violated or threatened by respondent and, therefore, the principle of *damnum absque injuria* is applicable and petitioners may not therefore maintain the action.

4. If public injury be the basis of petitioners' complaint, then only the public agencies designed in paragraph 20 may invoke the remedy to be conferred.

It follows that petitioners do not come within the designation of "any party in interest," as that phrase was construed in *Edward Hines Yellow Pine Trustees* v. *U. S.*, *supra*, and the other cases, *supra*, and as used in paragraph 20, Section 1, and that they therefore may not maintain the purported cause of action alleged in the complaint against respondent.

Respectfully submitted,

A. C. SPENCER,
T. W. BOCKES,
HENRY N. ESS,
Counsel for Respondent.

APPENDIX.

Paragraphs 18 and 20 of Section 1 of the Transportation Act 1920 are as follows:

"(18) *Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

"(20) *Issuance of certificate by commission; unlawful extension or abandonment of lines.* The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the

terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

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In the

Supreme Court of the United States

October Term, 1939.

No. 825. 35

KANSAS CITY, MISSOURI, a Municipal Corporation,
Petitioner,

vs.

L. SINGER & SONS, a Corporation, ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN M. CLEARY,
WM. PAUL PINKERTON,
ELMO HUNTER,
Counsel for Kansas City, Missouri, Petitioner.
All of Kansas City, Missouri.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

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In the

Supreme Court of the United States

October Term, 1939.

No. ———.

KANSAS CITY, MISSOURI, a Municipal Corporation,
Petitioner,

vs.

L. SINGER & SONS, a Corporation, ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Kansas City, Missouri, a municipal corporation, respectfully petitions this Court to grant a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit and to remove therefrom to this Court, for review, the record of the case therein pending of Kansas City, Missouri, a municipal corporation, petitioner, against L. Singer & Sons, *et al.*,[1] respondents, being case No. 11489 on the docket of that court.

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[1]The names of all the respondents are as follows: L. Singer & Sons, a corporation; Wm. F. Helm, doing business as Wm. F. Helm Produce Company; Arthur Harris, doing business as Kansas City Fruit & Produce Company; Robert T. Kesting, doing business as H. Kesting Produce Company; Chester F. Urban, doing business as Maguire-Urban Commission Company; Fara D'Angelo, doing business as D'Angelo Celery House; R. E. Mills, doing business as Mills Produce Company; H. R. Raker, doing business as Raker Produce Company; Ralph Hurst; Ralph Hurst & Company, a corporation; Reuben Kaplan, doing business as Royal Food Stores; Earl J. Tranin; Merchants Bank Building & Investment Company, a corporation, and North Side Business & Improvement Association, a *pro forma* decree corporation.

Respondents, who are commission or produce merchants, and property owners within and adjacent to the City Market of Kansas City, Missouri, brought a suit, being cause No. 11480 on the docket of the Eighth Circuit Court of Appeals, against the Union Pacific Railroad Company, a corporation, to enjoin said Union Pacific Railroad Company from constructing an extension of its line of railway in Kansas City, Kansas, to a proposed rival produce market and terminal in Kansas City, Kansas, until the Union Pacific Railroad Company shall have procured a certificate of convenience and necessity from the Interstate Commerce Commission covering said construction, as required by the provisions of Section 402, paragraph (18), of the Transportation Act of 1920 (Act of Congress, approved February 28, 1920, 41 Stat. 456, 477; 49 U. S. C. A., Section 1, paragraph [18]).[2]

Kansas City, Missouri, filed a motion for leave to intervene as a plaintiff (R. pp. 5-20), pursuant to the provisions of new Federal Rule No. 24, covering right of intervention, and in support of said motion to intervene filed a certified copy of a resolution adopted by the Council of Kansas City, instructing the proper officials to intervene for the City, and the proposed intervening petition of Kansas City.

The extent of petitioner's participation and interest in this suit is revealed by the fact that Kansas City is now engaged in constructing, in the vicinity of its present market which has been in existence for more than seventy-

[2]The pertinent part of said paragraph is as follows: No carrier by railroad, subject to this chapter, shall undertake the expansion of its line of railroad or the construction of a new line of railroad, or shall acquire or operate any line of railroad or expansion thereof, or shall engage in transportation under this chapter, over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad. * * *

five years, new wholesale and retail market buildings and facilities, at a cost of approximately $500,000. Said market is now and for a long period of time has been served by existing transportation facilities of various trunk line railroads, which have been and are suitable, convenient and adequate to meet the requirements of the market, and, in addition thereto, petitioner will lose large revenues in the form of taxes upon said land and buildings thereon, by reason of the decline in value thereof, and suffer loss in real estate values, as well as suffer a decline in value of its market and its use to the city, if the Union Pacific Railroad Company so extends its line.

The extent of Union Pacific Railroad Company's interest in this action is revealed by the fact that the cost of the railroad tracks and facilities constructed and to be constructed is about $500,000. In addition thereto, it has assisted in financing the construction of the Kansas City, Kansas, market by purchasing $3,000,000.00 par value of the revenue bonds issued by Kansas City, Kansas. The total cost of that market is approximately $4,000,000.00.

In the decision sought to be reviewed, decided February 7, 1940 (R. 42) (not yet reported), the majority of the Circuit Court of Appeals held that petitioner is not a "party in interest," entitled to maintain a suit to enjoin the unauthorized and, therefore, as alleged, unlawful extension of a line of railroad under the provisions of paragraph (20), Section 402, of the Transportation Act (41 Stat. 478, 49 U. S. C. A. 1 [20]).

Circuit Judge Kimbrough Stone rendered a vigorous dissenting opinion in which he stated that petitioner is "a party in interest" and as the basis for such conclusion relied in part upon the decisions of this Court in *Western Pacific Railroad Company* v. *Southern Pacific Company*, 284 U. S. 47, and *Texas & Pacific Railway*

Company v. *Gulf, Colorado & Santa Fe Railway Company*, 270 U. S. 266. A certified copy, including the proceedings in the Circuit Court of Appeals for the Eighth Circuit, and additional copies of said record and proceedings, as required by Rule 38 of this Court, have been forwarded to the clerk of this Court by the clerk of the Circuit Court of Appeals for the Eighth Circuit.

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The principal question involved in this petition is whether or not the United States Circuit Court of Appeals for the Eighth Circuit was in error in its majority opinion in affirming (R. 42) (not yet reported) the decree of the District Court of the United States for the Western Division of the Western District of Missouri (R. 30) (26 Fed. Supp. 721), and in denying Kansas City's motion to intervene, and holding that it was not a party in interest so as to maintain its proposed petition.

Stated briefly, certain commission merchants of Kansas City, Missouri, brought suit[3] to enjoin the Union Pacific Railroad Company from constructing an extension of its line of railway in Kansas City, Kansas, until such time as it has procured a certificate of convenience and necessity from the Interstate Commerce Commission covering such construction as is required by Section 402, paragraph (18), of the Transportation Act of 1920 (41 Stat. 456, 477; 49 U. S. C. A., Section 1, paragraph [18]).

The complaint of these commission merchants alleges that Union Pacific Railroad Company proposes to construct and operate in interstate commerce, at the cost of some $500,000.00, an extension of its line of railroad which will serve a proposed and partly constructed large produce market costing approximately $4,000,000.00, which is to be constructed by the City of Kansas City, Kansas, and that said produce merchants have places of business within or in connection with a similar market which long

[3] L. Singer and Sons, a corporation, *et al.*, v. Union Pacific Railroad Co., a corporation (R. 1).

has been established in Kansas City, Missouri, and which has adequately served the two cities; and that the Kansas City, Missouri, market is now adequately served by a number of railroads. It is further alleged in the complaint that the change in the transportation situation, which will be created by the unauthorized and, therefore, unlawful extension of respondent's line of railroad would directly and adversely affect their welfare and cause them considerable damage and pecuniary loss (R. 1).

Kansas City then moved to intervene as a party plaintiff upon the ground that it is entitled to jointly maintain this action as a "party in interest" under the provisions of paragraph 20 of Section 1 of the Interstate Commerce Act;[4] and the Judicial Code, Sections 212 and 213, as amended (Title 28, U. S. C. A., Section 45a). Kansas City filed its motion for leave to intervene as a party plaintiff, pursuant to the provisions of new Federal Rule No. 24, covering right of intervention, and in support of said motion to intervene filed a certified copy of a resolution adopted by the Council of Kansas City, instructing the proper officials to intervene for the City and the proposed intervening petition of Kansas City (R., pp. 5-20).

Briefly, said motion stated that there was already pending a suit by certain commission or produce merchants against Union Pacific Railroad Company to enjoin said party from extending its line until it had received a cer-

---

[4]Interstate Commerce Act, paragraph (20), Section 1, Title 49, U. S. C. A. The pertinent parts of the paragraph referred to read as follows:

. . . From and after the issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate, and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction in a suit of the United States, the Commission, any commission or regulatory body of the state or states affected, or *any party in interest*. . . . (Italics ours.)

tificate of convenience and necessity from the Interstate Commerce Commission, and that for seventy-five years there has been built up in Kansas City, Missouri, a large volume of business and a great number of merchants engaged in buying and selling, at wholesale and retail, food products in and around the City Market center located in Kansas City, Missouri, and that as a complement to such business there are a great number of firms in said city engaged in business connected with and bearing a direct relation to said wholesale and retail produce merchants and depending upon their business, and that as a result thereof said wholesale and retail produce merchants and these businesses dependent thereon, have invested in real estate, buildings, improvements and equipment in and about said market center many millions of dollars; that said market center is now and has been equipped, for many years, with more than adequate railroad and transportation service, and all appurtenances necessary to a marketing center for a large urban population and is fully able to serve Kansas City and its adjacent territory and the proposed plan and scheme of the Union Pacific Railroad Company is to promote the erection of a competing market center in Kansas City, Kansas, and to build the necessary extension of its lines to serve the same wherein and whereby it will be enabled to control the operation thereof and divert revenues from Kansas City, Missouri, and from the persons engaged in said wholesale and retail produce business, and will thereby divert a large amount of freight and other revenue, and, in addition thereto, many of these individuals and businesses will remove themselves from Kansas City, Missouri, and carry on their business in said competing market center, and thus the personal and occupation taxes and licenses which the aforesaid businesses and persons

ordinarily pay and would pay to Kansas City, Missouri, will be diverted and lost, and will cause a great loss to the city of revenue; and further alleged that as a result of this and the other facts stated there will be a great depreciation of the property of said city, and as a result a great loss in taxes placed upon such property by Kansas City, Missouri. Further, that Kansas City, Missouri, had issued duly authorized bonds to be used in the construction of a new wholesale and retail market in conjunction with the present market of said city, which new market is now under construction and the value of which market, and bonds financing the same, would be greatly impaired if Kansas City, Missouri, would not be allowed to intervene and to enjoin the Union Pacific Railroad Company in its project.

The motion further alleged that the representation of Kansas City's interest by respondents was inadequate, in that the judgment in this action would be binding upon Kansas City, Missouri, and inasmuch as there is no public or *quasi*-public body with any interest in the subject matter which could adequately represent Kansas City as a party to this suit, Kansas City should be allowed to intervene.

Kansas City, by its motion, sought to intervene on its own behalf, and also on behalf of all citizens and taxpayers of said city in that all such have a common and general interest in this proceeding, and the parties are so numerous as to make it impracticable to bring them all before the court.

The motion to intervene was premised, among other things, upon Kansas City being a party in interest within the meaning and intendment of Section 1, paragraph (20) of said Interstate Commerce Act.

The intervening petition of Kansas City followed sub-

stantially the allegations of the motion of Kansas City to intervene and in addition thereto alleged more in detail that the use and operation of the proposed extension of Union Pacific Railroad will seriously interfere with the use and operation of the tracks, loading docks and other appurtenances thereto used by the railroads which have served Kansas City, Missouri, and Kansas City, Kansas, and will cause a material change in the transportation situation in Kansas City, Missouri, rendering loss to Kansas City by adversely affecting the businesses and properties located therein and by impairing the adequacy of the present transportation system to petitioner, and create a rival market without producing additional produce to be handled therein, or additional consumers to be served thereby, resulting in unnecessary duplication of railroad facilities at a cost of over $500,000.00.[5]

The answer of the Union Pacific Railroad Company asserted four defenses, the first three of which were: (1) that the court had no jurisdiction over the subject matter of the action; (2) that the petitioner is not a party in interest under the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49, U. S. C. A., Section 1, paragraph [20]), and were not authorized to institute or maintain any action thereunder; and (3) that the complaint failed to state a claim against defendant upon which relief could be granted.

After the aforesaid answer was filed the Union Pacific Railroad Company made application to the District Court to hear and determine before trial the first three defenses set forth therein (R. 24).

The hearing was granted, no evidence was offered, and the case was submitted to the court on the pleadings and brief of counsel.

[5]The complaint is set forth in full at page 12 of the record.

The District Court held that it had jurisdiction of the suit but that the petitioner is not a "party in interest" within the meaning of the statute and hence could not maintain the action, and that, as a consequence, the complaint failed to state a claim upon which relief could be granted.

Petitioner then appealed to the Circuit Court of Appeals for the Eighth Circuit and on February 7, 1940, that court, by a two to one decision, affirmed the decree of the District Court. Judge Kimbrough Stone wrote a strong dissenting opinion in which he found petitioner to be a party in interest so as to be entitled to maintain its action.

II.

Jurisdiction.

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (28 U. S. C. A. 347). The date of the application for the writ may be taken as of the date of the filing of the petition in the office of the clerk of this Court.

B.

Questions Presented.

As previously indicated in Section A of this petition, the questions presented are whether the petitioner, which is a municipal corporation of the State of Missouri, and which is interested directly in its City Market and the transportation system thereof, as previously indicated, is a "party in interest" within the meaning of paragraph (20), Section 402, of the Transportation Act (41 Stat. 478, Title 49, U. S. C. A., Section 1, paragraph [20]),

and entitled to intervene so as to be a party plaintiff in an action against the Union Pacific Railroad Company to prevent it from constructing and operating an extension of its railroad to a proposed rival produce market in Kansas City, Kansas, which, by such extension, will directly and adversely affect the property interests of the petitioner by bringing about a material and adverse, burdensome, unnecessary and uneconomical change in the transportation system of said petitioner, and directly and adversely affect its property interests in causing loss to it by depreciation of property values and loss of taxes thereon, together with the loss of occupation licenses from businesses which will move to the rival and unnecessary market in Kansas City, Kansas, for which said extension the Union Pacific Railroad Company has not procured a certificate of convenience and necessity from the Interstate Commerce Commission, as required by law.

The question of whether petitioner is a party in interest within the meaning of paragraph (20) of Section 402 of the Transportation Act was duly raised and passed upon at all stages of the proceeding.

Petitioner, in its motion to intervene (R. 5) and in its proposed intervening petition (R. 12), alleged that it was a party in interest under the provisions of said section. The Union Pacific Railroad Company, in its answer, denied that petitioner was a party in interest under the provisions of said section (R. 20). The District Court upheld that contention in paragraph 4 of its decree (R. 26). Petitioner in its statement of points on appeal (R. 35) alleged, in paragraphs 1, 2 and 3 thereof, that the District Court erred in holding that the petitioner was not a party in interest. The majority opinion of the Circuit Court of Appeals upheld the contention that the petitioner was not a party in interest (R. 42) and petitioner

assigns such action as error in their specification of errors herein.

The opinion of the Circuit Court of Appeals stated that:

> "We realize that the meaning of the 'party in interest,' as used in Section 402, paragraph (20), of the Transportation Act, might be extended to include parties standing in the situation of these plaintiffs and of Kansas City, Missouri. We think that as yet persons in their situation have not been regarded as being 'parties in interest' who may maintain a suit such as this."

Petitioner contends, on the contrary, that the complaint, as pointed out clearly in the dissenting opinion, showed how the welfare, interest and rights of petitioner would be directly and adversely affected as a result of the proposed expansion of the railroad, and how the railroad service which it receives would be impaired, all resultant of the material change in the transportation situation created by the proposed extension of the Union Pacific Railroad.

As stated by Judge Stone, in his dissenting opinion, the following would seem to make Kansas City a party in interest within the meaning and intent of the Act:

> "As to appellant Kansas City, Missouri, the allegation of financial loss is in taxes through diminution of real property values and possible movement of the present produce merchants from the City to the vicinity of the contemplated market in Kansas City, Kansas. Also loss through the situation that it is now erecting a new market structure at considerable cost. It seems to me that these allegations are of sufficient, definite and adverse financial effect to bring the City within the statute.
>
> "I cannot agree that the proposed extension by de-

fendant does not directly affect complainants and intervenor. It is quite evident from the complaint and from the offered intervening petition (1) that plaintiffs and intervenor will be financially affected by the proposed rival market; and (2) that such rival market cannot come into existence without this extension by defendant." (R. 52-53.)

The dissenting opinion of Judge Stone premised its reasoning upon the reasoning followed by this Court in the case of *Western Pacific California Railroad Company* v. *Southern Pacific Company*, 284 U. S. 47, 51-52, which held that the Western Pacific California Railroad Company was a party of interest within the meaning of the Act here in question. *Referring to that case, Judge Stone said that it established direct financial loss caused to a party was sufficient to bring that party within the terms of the act, and that such financial loss is clearly stated in the petition of petitioner in the suit now before this Court* (R. 52). (Italics ours.)

The complaint of petitioner (R. 12-20) alleges and establishes that petitioner's welfare will be "directly and adversely affected" by the proposed material change in the transportation system.

Kansas City's market center, the merchants who are a part thereof, the railroads which serve the same, and the storage and other facilities which surround and are adjacent to the same are all inter-dependent upon each other. Without all of them none could function. If there was no market there would be no freight; if there were no storage facilities there could be no market. These facilities represent millions of dollars in equipment; Kansas City has invested millions of dollars in improvements in and around this locality. Kansas City should have the right to see that its interests and that of the public are

properly presented in determining whether or not the Union Pacific Railroad Co. may go ahead with its project without having first determined the very material question of whether the public convenience and necessity require the existence of double market facilities and double market terminals in this area.

And as stated by Judge Stone in his dissenting opinion:

> "The allegation of financial loss is in taxes through diminution of real property values and possible movement of the present produce merchants from the city to the vicinity of the contemplated market in Kansas City, Kansas. Also loss through the situation that it is now erecting a new market structure at considerable cost."

Kansas City also may be subjected to a loss of transportation service supplied by competing railroads whose service may be curtailed as a result of impairment of their revenues by reason of the new competition set up by the change in the transportation situation. Kansas City thus should be considered within that clause which Congress sought to protect through the enactment of the statute.

This Court said in the case of *Western Pacific California R. R. Co., supra*, 284 U. S., l. c. 51:

> "If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the congressional plan for promoting transportation."

And also on page 51 of that opinion this Court states its interpretation of the Transportation Act and said:

"It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened *or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation.*" (Italics ours.)

Petitioner contends that the majority of the Circuit Court of Appeals erroneously construed the meaning of "a party in interest" as used in the statute, and as interpreted by this Court in the above cited case of *Western Pacific California R. R. Co.* v. *Southern Pacific R. R. Co.* Petitioner believes that its complaint as well as its motion to intervene shows that the construction and operation of the proposed extension of the railroad by Union Pacific Railroad Company will directly and adversely affect property interests and rights of petitioner and will cause it to suffer a financial loss, and will bring about a material change in the transportation system which will constitute an unnecessary burden upon interstate commerce and directly and adversely affect the welfare and rights of petitioner.

IV.

Reasons for Granting the Writ.

The discretionary power of this Court to grant a writ of certiorari is urged and sought upon the following grounds:

1. The decision and judgment of the 8th Circuit Court of Appeals is contrary to the decisions of this Court in the cases of *Western Pacific California R. R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47, and *Texas & Pacific Ry. Co.* v. *Gulf, Colorado and Santa Fe Ry. Co.*, 270 U. S. 266, construing the provisions of the Transportation Act (41

Stat. 456, 477, 478), and defining the meaning of the phrase "party in interest" as used in paragraph (20), Section 402 of said Act.

2. The decision and judgment of the 8th Circuit Court of Appeals leaves in confusion the meaning of the phrase "party in interest" as used in paragraph (20), Section 402 of the Transportation Act.

3. The decision and judgment of the 8th Circuit Court of Appeals involves a very important question of federal law which should be definitely settled by this Court.[6]

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the 8th Judicial Circuit to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals for the 8th Judicial Circuit be reversed, for the reasons and grounds hereinbefore recited.

JOHN M. CLEARY,
WM. PAUL PINKERTON,
ELMO HUNTER,
Attorneys for Kansas City, Missouri.
All of Kansas City.

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[6]In his dissenting opinion Judge Stone stated:

"I am constrained to state the grounds for such dissent not only by the need for justifying a dissent from the view of judges for whose judgment I have the highest respect, but also by what I conceive to be *the importance of this decision to the efficient operation of the provision of this Act requiring certificates of convenience and necessity before extensions of railway trackage are permissible* (U. S. C. A. Title 49, Section 1, par. 18).

"The Transportation Act was designed to place the interstate railroads more completely than ever under the fostering guardianship and control of the (Interstate Commerce) Commission, by placing under its supervision various specified matters, among which is construction or abandonment of lines. (*Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 341-342; *Dayton Goose Creek Ry. Co.* v. *U. S.*, 263 U. S. 456, 478.) *The importance of this control over extensions or abandonments to realization of the purposes of the Act is obvious . * * * Since the above is the only method of protecting and making fully effective this control of the Commission, the importance of any definition of 'party in interest'—those who may initiate such procedure—is evident.*" (Italics ours.)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Court Below.

The decree of the District Court of the United States for the Western Division of the Western District of Missouri, holding that petitioner is not a "party in interest" who may maintain this action; and that the complaint fails to state a claim upon which any relief can be granted in directing a dismissal of petitioner's motion to intervene and of its intervening complaint, appears in the record at page 25, and the memorandum opinion of the court appears in the record at page 30, and is reported in 26 Fed. Sup. 721. The opinion of the Circuit Court of Appeals for the 8th Judicial Circuit affirming the decree of the District Court was dated and entered February 7, 1940, and is found in the record at page 42. It is not yet officially reported.

II.

Jurisdiction.

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, C. 229, 43 Stat. 936 (28 U. S. C. A. 347). The date of the application for the writ may be taken as of the date of the filing of the petition in the office of the clerk of this Court.

III.

Statement of the Case.

A statement of the case is set forth in the foregoing petition under the caption "Summary Statement of the Matter Involved," to which reference is hereby made.

IV.

Specifications of Errors.

1. The Circuit Court of Appeals for the 8th Judicial Circuit erred in affirming the decree and judgment of the United States District Court for the Western Division of the Western District of Missouri adjudging and decreeing that petitioner is not a "party in interest" who may intervene and maintain this action under the provisions of paragraph (20) of Section 1 of the Transportation Act. (41 Stat. 478, Title 49, U. S. C. A., Sec. 1, par. 20.)

2. The Circuit Court of Appeals for the 8th Judicial Circuit erred in affirming the decree and judgment of the United States District Court for the Western Division of the Western District of Missouri adjudging and decreeing that the intervening petition fails to state a claim upon which any relief can be granted, for the reason that said petition states a good cause of action and a claim on which relief can be granted under the provisions of said Transportation Act.

3. The Circuit Court of Appeals for the 8th Judicial Circuit erred in affirming the decree and judgment of the United States District Court for the Western Division of the Western District of Missouri dismissing petitioner's motion to intervene and petitioner's intervening complaint, for the reason that said motion to intervene states proper grounds for intervention and the intervening com-

plaint states a claim upon which relief can be granted under the provisions of said Transportation Act.

4. The Circuit Court of Appeals for the 8th Judicial Circuit erred in affirming the decree and judgment of the District Court for the Western Division of the Western District of Missouri, and in determining that the petitioner is not "a party in interest" within the meaning an intendment of said Transportation Act, because such determination is contrary to the purposes of the Act, and conflicts with the decisions of this Court, interpreting the meaning of said phrase, in *Western Pacific California Railroad Co.* v. *Southern Pacific Company,* 284 U. S. 47, and *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.,* 270 U. S. 266.

5. The Circuit Court of Appeals for the 8th Judicial Circuit Court erred in affirming the decree and judgment of the District Court for the Western Division of the Western District of Missouri, adjudging and decreeing that the petitioner was not entitled to intervene in said action for the reason that pursuant to the provisions of new federal rule No. 24, covering the right of intervention, the motion to intervene and the proposed intervening petition attached thereto entitled petitioner as a matter of law to the right to intervene in that they each state sufficient facts and allegations to give petitioner a right to maintain such an action and to constitute it a party in interest, entitled to relief prayed, within the terms of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 1, pars. 18 to 21, inclusive) and within the provisions of federal rule No. 24 governing interventions.

6. The Circuit Court of Appeals for the 8th Judicial Circuit erred in affirming the decree and judgment of the District Court for the Western Division of the Western District of Missouri in adjudging and decreeing that peti-

tioner had no right to intervene and in denying its motion for leave to intervene on the ground that the motion to intervene as a party plaintiff stated no facts sufficient to justify the relief asked therein, for the reason that said motion did state facts sufficient to justify the relief asked therein and to give the right to intervene.

V.
ARGUMENT.

Petitioner Kansas City, Missouri, omits stating any argument here for the reason that the facts and reasons given in the petition for the writ clearly state the position of the petitioner and shows its right to have the writ issued as prayed.

Conclusion.

It is therefore respectfully submitted to this Honorable Court that this case is one of great public importance calling for the exercise by this Honorable Court of its supervisory powers and in order that justice may be done herein and that the confusion and conflicts on important questions herein involved can be corrected and that to such an end a writ of certiorari should be granted and this Court should review the decision of the 8th Judicial Circuit in this case and finally reverse that decision.

Respectfully submitted,

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Counsel for Kansas City, Missouri, Petitioner.
All of Kansas City, Missouri.

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In the

Supreme Court of the United States

October Term, 1940.

No. 35.

KANSAS CITY, MISSOURI, a Municipal Corporation,
Petitioner,

vs.

L. SINGER & SONS ET AL., *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITIONER'S BRIEF.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITIONER'S BRIEF.

I.

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit appears in the record beginning at page 33. This opinion is reported in 109 Fed. (2d) 493. The opinion of the Federal District Court for the Western District of Missouri appears in the record beginning at page 25 and is reported in 26 Fed. Supp. 721.

II.

JURISDICTION.

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (C. 229, 43 Stat. 936, 28 U. S. C. A. 347).

III.

STATEMENT OF THE CASE.

Nature of the Case.

L. Singer & Sons *et al.*, being commission merchants in Kansas City, Missouri, brought suit to enjoin the Union Pacific Railroad Company from building and operating an extension of its railroad consisting of a produce terminal and appurtenant trackage in Kansas City, Kansas, until such time as it had applied for and obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require the construction and operation of said extension as required by the so-called Transportation Act of 1920.[1] The city of Kansas City, Missouri, filed a motion for leave to intervene as a plaintiff upon the ground that it is entitled to jointly maintain the action as a "party in interest" under paragraph (20) of Section 1 of the so-called Transportation Act.

Complaint of L. Singer & Sons *et al.*

The complaint of L. Singer & Sons *et al.* (R. 1), being the produce or commission merchants seeking to enjoin the Union Pacific from building and operating the extension of its line in question, in brief alleges that Union Pacific Railroad Company proposes to construct and operate at large cost, in interstate commerce, an extension of its line of railroad which will serve a large food terminal and produce market which is to be constructed as a joint enterprise by the Union Pacific Railroad Company and the city of Kansas City, Kansas; that these

[1]Section 402, Par. (18), of the Transportation Act of 1920 [41 Stat. 456, 477; 49 U. S. C. A., Section 1, Par. (18).]

produce or commission merchants own and have places of business within and adjacent to a similar market known as the City Market of Kansas City which has long been established in Kansas City, Missouri, and which has for more than seventy-five years adequately served the two cities; and that the Kansas City, Missouri, market is now adequately served by a number of railroads. Their complaint further alleges that the change in the transportation system which will be created by the unauthorized, and therefore unlawful, extension of the line of the Union Pacific Railroad will directly and adversely affect petitioners' welfare, and cause a direct financial loss to them. This direct loss is alleged to arise as a result of the fact that the construction and operation of the proposed extension would, among other things, destroy or seriously and adversely affect the businesses, properties and large financial investments of petitioning produce merchants within and adjacent to the existing Kansas City, Missouri, market; would create a rival produce market far removed from the center of population and inconvenient to a great majority of the citizens of the two cities, without any increase in the amount of business handled and notwithstanding the fact that the present Kansas City, Missouri, market is entirely adequate; would result in unnecessary and wasteful duplication of railroad facilities, at a cost of over $500,000.00, with no increase in freight to be handled; would divert traffic to the Union Pacific Railroad from other railroads which are now adequately handling the traffic to the existing produce market; would cause destructive competition between railroads serving the two cities and impair the adequacy of their service to petitioning produce merchants; and would result in wasteful and needless expenditure by the Union Pacific Railroad Company.

Petitioner's Motion to Intervene and Proposed Intervening Petition.

Kansas City, Missouri, then moved to intervene as a party plaintiff (R. 5). In brief, its motion stated that there was then pending a suit by these produce or commission merchants above mentioned against Union Pacific Railroad Company, and restated substantially the allegations of that complaint, and alleged further that over a period of seventy-five (75) years there had been built up in Kansas City, Missouri, a large volume of business and a great number of merchants engaged in the business of the City Market located in Kansas City, Missouri, and that as a complement to such business there are a large number of firms in said city engaged in business connected with and bearing a direct relation to these merchants and depending upon their business, and that as a result thereof these merchants and these businesses so dependent thereon have invested in real estate, buildings, improvements and equipment in and about said market center, many millions of dollars; that said market is now and has been equipped, for many years, with more than adequate railroad and transportation service, and that the market is fully capable of serving Kansas City and its adjacent territory to which it is easily accessible by rail and hard-surfaced roadways; that the proposed plan and scheme of the Union Pacific Railroad Company is to promote the erection of a competing market center or food terminal in Kansas City, Kansas, and to build the necessary extension of its lines to serve and to be a part of the same, whereby it will be enabled to control the planned food terminal and to divert revenues from Kansas City, Missouri; and from the produce merchants engaged in their business in Kansas City, Missouri; and

to divert a large amount of freight and other revenue from Kansas City, Missouri; and to cause many of these produce merchants to remove themselves from Kansas City, Missouri, and carry on their business in the competing, planned food terminal, and thus cause direct financial loss to Kansas City, Missouri, by way of, among other things, loss of personal occupation taxes and licenses which the aforesaid businesses and persons ordinarily paid and would pay to Kansas City, Missouri; loss by way of a great depreciation of the property of the city; loss in taxes as a result of depreciation of the assessable values applicable to taxable property within the city; loss by way of reduction in value of bonds issued by Kansas City, Missouri, for construction of a new wholesale and retail market in conjunction with its present market, which new market is under construction. From all of this by necessary implication petitioner will suffer loss by impairment of the transportation system serving Kansas City, Missouri.

This motion further alleges that representation of the interest of petitioner herein by respondents is inadequate, will not unduly delay or prejudice the rights of the original parties, and contains the other necessary allegations showing the right and propriety of petitioner to intervene and maintain this action.

The intervening petition of Kansas City (R. 11) follows substantially, but in greater detail, the allegations of the motion to intervene. It specifically alleges that the unauthorized construction and operation of the proposed extension of the Union Pacific Railroad will seriously interfere with the use and operation of the tracks, loading docks and other appurtenances located in and about said City Market of Kansas City, Missouri, and used and in use by the railroads serving Kansas City, Missouri,

and Kansas City, Kansas, and will cause a material change in the transportation system in Kansas City, Missouri, and will result in loss to the City by adversely affecting business and property located therein, some of which property is owned directly by the City, and by impairing the adequacy of the present transportation system to the detriment and direct loss of petitioner, and contains numerous other allegations of direct loss to petitioner.

Answer of Union Pacific Railroad Company.

The answer of Union Pacific Railroad Company (R. 18) asserted four defenses, the first three of which defenses are: (1) That the court had no jurisdiction over the subject matter of the action; (2) That petitioners are not parties in interest under the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A., Section 1, Par. 20) and were not authorized to institute or maintain any action thereunder, and (3) That the complaint failed to state a claim against defendant upon which relief could be granted.

After filing answer, the Union Pacific Railroad Company made application to the court to hear and determine before trial said first three defenses (R. 22). The hearing was granted, no evidence was offered, and the case was submitted to the court on the pleadings and briefs of counsel.

Summary of the Opinion Below.

The District Court held that it had jurisdiction of the suit (Defense No. 1), but that L. Singer & Sons and petitioner Kansas City were not "parties in interest" within the meaning of the Transportation Act and hence

could not maintain the action, and that, as a consequence, "the complaint failed to state a claim upon which any relief can be granted," and the motion of Kansas City, Missouri, to intervene as a party plaintiff therein was refused on the ground that Kansas City, Missouri, "is not a party in interest authorized to maintain or intervene in said action" (R. 23, 25).

The United States Circuit Court of Appeals for the Eighth Circuit, by a two-to-one decision, affirmed the decree of the District Court (R. 33). Senior Circuit Judge Kimbrough Stone wrote a strong dissenting opinion (R. 40).

IV.

SPECIFICATIONS OF ERRORS.

1. The United States Circuit Court of Appeals for the Eighth Circuit erred in affirming the decree and judgment of the United States District Court for the Western Division of the Western District of Missouri adjudging and decreeing that petitioner is not a "party in interest" who may intervene and maintain this action under the provisions of paragraph (20) of Section 1 of the Transportation Act (41 Stat. 478, Title 49 U. S. C. A., Sec. 1, Par. 20).

2. That said Circuit Court of Appeals erred in affirming the decree and judgment of said District Court adjudging and decreeing that the City of Kansas City, Missouri, is not a party in interest authorized to maintain or intervene in said action, and in adjudging and decreeing that L. Singer & Sons *et al.*, original petitioners, are not parties in interest who may maintain the action.

3. The said Circuit Court of Appeals erred in affirming the decree and judgment of the said District Court dismissing L. Singer & Sons' complaint and refusing leave for Kansas City to maintain or intervene in said action for the reason that said complaint states a good cause of action and a claim on which relief can be granted under the provisions of said Transportation Act, and petitioner's motion to intervene and its proposed intervening complaint also state proper grounds for intervention and a good cause of action upon which relief can be granted under the provisions of said Transportation Act.

4. That said Circuit Court of Appeals erred in affirming the decree and judgment of said District Court and in determining that petitioner is not a party in interest within the meaning of the Transportation Act, because such determination is contrary to the purposes of the Act, and conflicts with decisions of this Court, interpreting the meaning of said phrase, in the cases of *Western Pacific California Railroad Co.* v. *Southern Pacific Company*, 284 U. S. 47, and *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266.

V.

STATUTES INVOLVED.

It is alleged in the complaint of L. Singer & Sons *et al.*, in which action petitioner seeks to intervene as a party plaintiff, that Union Pacific Railroad Company failed to secure a certificate of public convenience and necessity for the construction of the extension, as required by paragraph (18), Section 1, of the Transportation Act, 1920 (Title 49 U. S. C. A., Sec. 1, Par. 18), which provides as follows:

> "(18) No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Petitioner contends that because the Union Pacific Railroad Company failed to secure a certificate of public convenience and necessity, it is a party in interest author-

ized to intervene and maintain the action under paragraph (20) of Section 1, Transportation Act, 1920 (Title 49 U. S. C. A., Sec. 1, Par. 20), which provides as follows:

> "(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance or the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, *or any party in interest;* * * *." (Italics ours.)

VI.

ARGUMENT.

1. Petitioner is a party in interest and authorized and entitled to intervene in and maintain the action under the laws of the United States, and particularly under the specific provisions of paragraphs 18 and 20 of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A., Sec. 1, Pars. 18 and 20).

Paragraph 18 of Section 1 of the Interstate Commerce Act (Title 49 U. S. C. A., Sec. 1, Par. 20) reads, in part, as follows:

> "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad or the construction of new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, * * *."

Paragraph 20 of Section 1 thereof reads, in part, as follows:

> "Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, *or any party in interest.*" (Italics ours.)

The lower court held that the petitioner is not a "party in interest" within the meaning of paragraph 20 of Section 1 of the Interstate Commerce Act because its inter-

est and rights are not directly affected by the allegedly illegal construction and operation of the trackage in and extension and connection with the New Food Terminal. In arriving at the conclusion that petitioner is not a party in interest within the meaning of the statute, the court appears to have proceeded upon the theory that the petitioner may not intervene in and maintain the suit because it does not possess such a clear legal right as would entitle it to relief under the rules commonly accepted by courts of equity. The lower courts further proceeded upon the theory that the petitioner was not and will not be directly affected by the extension in question.[2]

Neither petitioner nor this Honorable Court is concerned with the question of whether or not in the absence of the statutory provision in question, the petitioner would have no right of action. The supporting cases cited by the appellate court below and by the Union Pacific Railroad Company that concerned themselves with the right of petitioner in the absence of the statutory

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[2]United States District Court—memorandum opinion—on page 25 of the record states at 27:

> "The complaint and motion to intervene disclose that neither plaintiffs, nor the city of Kansas City, Missouri, are engaged in the transportation business. It further appears that neither the property or confines of either are touched, encroached upon or directly affected by the proposed construction of the so-called 'extensions.' There is no violation of any definite legal right alleged. Therefore, neither plaintiffs nor the City of Kansas City, Missouri, may maintain this action."

The United States Circuit Court of Appeals for the Eighth Circuit, opinion (record at page 38) states:

> "The plaintiffs have no definite legal right which is threatened. They are, however, persons whose welfare may be (fol. 49) adversely affected by the bringing about of a material change in the transportation situation, in the sense that the extension proposed by the defendant, if built and operated, will enable a competitive market to function to their detriment. In that sense, we think it may safely be said that the proposed extension of defendant's lines may adversely affect the plaintiffs' welfare. We are of the opinion, however, that their complaint discloses that their welfare cannot be directly, but only indirectly and consequentially, affected by the proposed extension."

provision are not authority for the conclusions reached in the majority opinion of the Circuit Court of Appeals. In the absence of the statute in question, it is clear that petitioner would have no right to intervene in and maintain this action. Prior to 1920, the Interstate Commerce Act did not contain paragraphs 18 to 22 of Section 1. These new paragraphs were added by the so-called Transportation Act of 1920. Prior to the enactment of the Transportation Act, the Interstate Commerce Act placed no restraint on competition between the railroads by way of the construction of competing lines. One line might duplicate the facilities of another regardless of whether the public necessity called for that action. The competition was unrestricted and great public waste was the result. Congress recognized that the building of unnecessary lines by the carriers, the duplication of facilities already adequate to serve the needs of the public, and unrestricted competition between carriers, was a matter in which the public had a primary interest. Congress further recognized that such unregulated action on the part of the carriers imposed a burden upon commerce directly affecting the public interest. It is the contention of petitioner that the regulations established by the so-called Transportation Act of 1920, and the remedy given for an attempted violation thereof, governs the conduct of the Union Pacific Railroad Company with respect to the matters herein referred to and gives to the petitioner because of its direct interest and because of the direct injury that petitioner alleges will result therefrom, the right to intervene and maintain this action.

In the enactment of the Transportation Act of 1920, petitioner does not believe that it was the intent of Congress to allow only competing railroads to be able to challenge by court action the unlawful conduct of a rail-

road company which attempts to make an extension of its line without having first secured a certificate of convenience and necessity. The requirement of such a certificate is to prevent economic waste and injury to the public interest which might result from unnecessary duplication of facilities, or bring about a "material change in the transportation situation" which is adverse to the public interest. On the contrary, as expressed by this Court in the case of *Western Pacific California Railroad Company* v. *Southern Pacific Company*, 284 U. S. 47, has said:

> "If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See *Massachusetts* v. *Mellon*, 262 U. S. 447, 488. *It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation.* Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened. It alleged the beginning of an unlawful undertaking by a carrier which might prove *deleterious to it as well as to the public interest in securing and maintaining proper railroad service without undue loss.* It relied upon the procedure prescribed by the statute to secure an orderly hearing and proper determination of the

matter. *The disclosures of the bill were enough to show that the respondent's intended action might directly and seriously affect the project which complainant was undertaking in good faith. There was enough to give the latter the standing of a 'party in interest' within intendment of the Act.*" (Italics ours.)

Thus this Court has already clearly expressed itself as saying that Section 1, paragraphs 18 to 22, of the Transportation Act of 1920 requires a certificate of convenience and necessity for extension of a railroad line and that any party in interest could enjoin a railroad proceeding to construct or use such an extension without such certificate. The Court has further said that a party in interest is not necessarily one who has some clear legal right for which it might ask for protection under the rules commonly accepted by courts of equity, but that on the contrary, so long as the bill discloses that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation, then petitioner is a party in interest and entitled to maintain a suit. The Court has recognized that although a party in interest must possess something more than a common concern for obedience to law this "something more" is supplied where petitioner is peculiarly concerned and its own welfare seriously threatened. This "something more" was held to be satisfied by the allegation that defendant carrier was beginning an unlawful undertaking which might prove deleterious to complainant as well as to the public interest in securing and maintaining a proper railroad service without undue loss; that the bill contained enough to show the intended action might directly and

seriously affect the project which complainant was undertaking in good faith. This Court then said that there was enough to give the latter a standing of a "party in interest" within the intendment of the Transportation Act.

We believe that this Court's intent in the case of *Western Pacific California Railroad Company* v. *Southern Pacific Company, supra,* in using the words "directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation," must be read in the light of this Court having in the immediately preceding language said that the complainant must possess "something more than a common concern for obedience to law" as showing that this Court intended no narrow interpretation of what may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation. Particularly is this true in view of the fact that the Transportation Act itself is a highly remedial Act intended to provide all parties injured or threatened with injury as a result of its violation, with a remedy. This Court has said in the case of *Piedmont & Northern R. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, at pages 311-312:

> "The Transportation Act was remedial legislation, and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended."

In enacting this highly remedial legislation Congress did not have in mind only the providing of a remedy for competing railroads, but on the contrary, intended primarily that the Act should protect the public and those

of the public who might suffer some injury or damage peculiar to themselves as contrasted with a mere common concern for obedience to law. It was to this latter class, i. e., those who might suffer some injury or damage peculiarly to them, that Congress entrusted the right to proceed by court action to call a halt to actions which might well result in great public waste. Concern for the public welfare and an evincing of the intent of Congress not to restrict too narrowly those who might act to prevent public waste is found in *Western Pacific Railroad Company* v. *Southern Pacific Railroad, supra,* at p. 277, wherein this Court said:

> "* * * that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival it may be the public which ultimately bears the loss. See *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; *New England Divisions Case,* 261 U. S. 184; *Chicago Junction Case,* 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.,* 264 U. S. 331. The Act sought, among other things, to avert such losses."

The fact that in the case of *Western Pacific California Railroad Company* v. *Southern Pacific, supra,* and the cases cited therein, a railroad happened to be the complainant, does not rule that others designated in the Transportation Act are precluded from bringing the action. If it had been the purpose of Congress to limit the right to bring injunctive actions of this character to the United States, the Interstate Commerce Commission, or any commission or legislating body of the state or states affected, or to any railroad whose territory is

invaded by another carrier, there would have been no need for the addition of the following phrase of the section reading, "or *any* party in interest." By common usage and ordinary understanding, the phrase "any party in interest" has always had a broad and comprehensive meaning. When this is considered together with the purpose of the Transportation Act, Congress must have intended thereby to extend and not to limit those who might bring or join in the action.

This Court, in the case of *Atchison, etc., Ry. Co.* v. *Railway Commission of California,* considered the question of whether or not the city of Los Angeles, California, had the right to invoke the power of the Interstate Commerce Commission to issue a certificate authorizing an extension of a railroad line or whether this right might be invoked only by carriers. On page 393 of that opinion this Court said:

> "It is urged that paragraphs 18 to 20 of Section 1 of the Interstate Commerce Act give the Commission no power to issue such certificates except upon application of the carriers, and that the certificates were also unauthorized under paragraph 21 of that section.
>
> The provisions of these paragraphs (18 to 21) contain no such limitation as that suggested. While they relate 'to the construction, acquisition, extension and abandonment of a railroad,' and 'deal primarily with rights sought to be exercised by the carriers' (*Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *United States,* 275 U. S. 404, 408) these paragraphs do not exclude appropriate action by the Commission upon applications by those who have a proper interest in the subject matter, although they are not carriers."

The city of Los Angeles was held to be a party in interest and entitled to maintain its action.

In the case of *Town of Inlet* v. *New York Central Railroad Co.*, (D. C. N. D., N. Y., 1934) 7 Fed. Supp. 781, the city of Inlet brought a suit in equity to annul a certificate of the Interstate Commerce Commission authorizing the abandonment of a line of railroad. The right of a city to bring such a suit was not even questioned.

Thus this remedial Act has as its purpose the protection not only of competing railroads but the protection of the public with particular regard to shippers and any others, such as Kansas City, Missouri, so situated that they might suffer a tangible and reasonably direct injury by an unauthorized, and therefore unlawful, extension which brings some material change in an existing transportation situation. While Congress undoubtedly intended to protect the general public from such public waste as often results from such changes, it has placed the enforcement of the Act in the hands of those who possess something more than a common concern for obedience to the law and who may, because of their peculiar circumstances, find themselves directly and adversely affected by the change.

In *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 638, this Court said, "The Act was passed for the protection of those who pay or bear the rates." See also *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 210.

This Court said, in *Colorado* v. *United States*, 271 U. S. 153, 162, "The certificate issues not primarily to protect the railroad but to protect interstate commerce from undue burdens or discrimination."

In conformity with this purpose, it is the policy of the Interstate Commerce Act and related statutes to permit cities, commercial organizations and shippers to participate not only in proceedings before the Commission, but also in those before the courts where the application of these statutes is involved. See *United States* v. *Merchants, etc., Assn.*, 242 U. S. 178, l. c. 188. Any person claiming to be damaged by an interstate carrier may either make complaint to the Commission or bring suit in a Federal District Court (Title 49 U. S. C. A., Sec. 9). Any person, firm, corporation, company, association, mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal corporation, may make complaint to the Commission regarding a violation of the statute [Title 49 U. S. C. A., Sec. 13 (1)]. In proceedings before the Commission or before a District Court to put a stop to rebates and concessions, all persons interested in or affected by the rate, regulation or practice under consideration may be made parties (Title 49 U. S. C. A., Secs. 42, 43). Communities, associations, corporations, firms and individuals who are interested in a controversy before the Interstate Commerce Commission or in any suit brought under the provisions of Sections 20, 43 and 49 of Title 49 may intervene in such suit at any time after its institution; and the Attorney General may not discontinue such suit over the objection of such intervener, but the intervener may prosecute, defend or continue the suit irrespective of the action or nonaction of the Attorney General (Title 28 U. S. C. A., Sec. 45a).

Other Federal Courts, as well as this Court, have recognized that the phrase "parties in interest" is not confined to railroads. In the case of *Detroit & M. Ry. Co.* v. *Bowne City, etc., Co.*, 286 Fed. 540 (D. C. E. D.,

Mich.), one of the plaintiffs, who was an owner of land that was sought to be condemned, brought suit as a party in interest, and the court held (Syl. 4):

> "A railroad company with which a proposed extension by another company will come in competition, or the owner of land over which such extension will pass, is a 'party in interest,' within the meaning of Interstate Commerce Act, Sec. 1, Par. 20, as amended by Transportation Act, Feb. 28, 1920, Sec. 402, and may maintain a suit to enjoin construction of such extension in violation of the Act."

In *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382, this Court held that a company operating a ferry within a state under a state charter was a party in interest under paragraph 20 of Section 1 of the Transportation Act and thus capable of instituting suit for the purpose of annulling an order and certificate of the Interstate Commerce Commission granting permission to a railway company to extend its line by a ferry over the same waters, and for the purpose of enjoining the railway from constructing and operating such proposed ferry where it appeared from the bill that such action might directly and adversely affect the welfare of the plaintiff by changing the transportation situation. On page 390 of the opinion, this Court said:

> "Considering *Texas* v. *Eastern R. Co., supra; Colorado* v. *United States,* 271 U. S. 153; *Western Pacific California R. Co.* v. *Southern Pacific Co.,* 284 U. S. 47, and *Transit Commission* v. *United States,* 284 U. S. 360, it must be held that appellant is a 'party in interest' within the meaning of the statute capable of instituting the present proceeding. The bill disclosed that the proposed and permitted action might directly and adversely affect its welfare by changing the transportation situation."

While, as stated previously in this brief, if the Union Pacific Railroad Company had applied for a certificate of convenience and necessity for this proposed extension, Kansas City, Missouri, would have been allowed, under the accepted interpretation of the Transportation Act, to appear and oppose the issuance of such certificate, where, however, the Union Pacific Railroad Company has failed to apply to the Interstate Commerce Commission for the certificate, the only remedy given to those to be affected by the contemplated action of the Union Pacific Railroad Company is that given by paragraph (20) of Section 1 of the Transportation Act. In *Texas & Pacific Ry. Co.* v. *Gulf, etc., Ry. Co.*, 270 U. S. 266, the court, at page 273, said:

> "* * * A party in interest who is opposed to the construction is not authorized by the Act to initiate before the Commission any proceeding concerning the project. If application for a certificate has been made, he may appear there in opposition. If no such application has been made, paragraph 20 affords him the only remedy. That remedy is both affirmative and complete."

Also in the case of *Powell* v. *United States*, 300 U. S. 276, this Court held that the question of the right of a railroad to construct or operate a track without first securing a certificate cannot be raised by instituting a proceeding before the Commission under the Interstate Commerce Act, but that the remedy must be found under Section 1, paragraph (20) of the Transportation Act.

Since Kansas City has the right and opportunity to be heard by the Interstate Commerce Commission upon the question of whether or not the proposed extension would serve the public convenience and necessity if the Union

Pacific Railroad Company had applied for such certificate, as under the Act it had the duty to do, then it would seem necessarily to follow that the City should have the right to enjoin the unauthorized, and thus unlawful, action of the Union Pacific Railroad Company until such time as it does make proper application in a proceeding wherein Kansas City would have the undoubted right to represent its interests. Particularly should this be the case where Kansas City is in the position of suffering a direct and adverse effect by the material change made, or to be made, in the transportation situation.

The court below held that although the proposed extension of the Union Pacific Railroad Company's line may adversely affect the petitioner's welfare, it will not do so directly, but only indirectly and consequentially. Petitioner submits that its welfare will be directly and adversely affected, as is revealed clearly by the motion and intervening petition. As was stated by Judge Kimbrough Stone in his able dissenting opinion in this case (R. 44):

> "As to appellant Kansas City, Missouri, the allegation of financial loss is in taxes through diminution of real property values and possible movement of the present produce merchants from the city to the vicinity of the contemplated market in Kansas City, Kansas. Also loss through the situation that it (the city) is now erecting a new market structure at considerable cost. It seems to me these allegations are of sufficient definite and adverse financial effect to bring the city within the statute.
>
> "I cannot agree that the proposed extension by defendant does not directly affect complainants and intervener. It is quite evident from the complaint and from the offered intervening petition (1) that plaintiffs and intervener will be financially affected

by the proposed rival market; and (2) that such rival market cannot come into existence without this extension by defendant.'"

No purpose would be served by restating at this point in the brief the allegations of petitioner's motion and complaint. Those provisions clearly allege facts revealing a direct financial loss to petitioner as a direct result of the extension or operation thereon which will bring about a material change in the transportation situation. The produce terminal in question, under the allegations of petitioner's motion and proposed intervening petition, is being built by Union Pacific Railroad Company and Kansas City, Kansas. The extension in question is an integral part of the enterprise. The extension in question, the petition alleges, will be the cause, among other things, of a lessening in value of the market property owned by Kansas City, Missouri; of a loss of efficiency of railroad service to the territory now adequately served, which reasonably might bring about higher rates; of a loss to petitioner of revenues from its said City Market properties; of a diversion of persons engaged in business at the Kansas City, Missouri, Market, from said Market to the proposed food terminal in Kansas City, Kansas, thereby resulting in a loss to Kansas City, Missouri; of the personal and occupation taxes and licenses now being paid by these merchants and produce men; a loss to petitioner from a diversion of freight and other revenue from Kansas City, Missouri; a reduction in value of bonds issued by Kansas City, Missouri, for construction of a new market in conjunction with its present market; a serious interference with the use and operation of tracks, loading docks and other appurtenances used by railroads serving Kansas City, Missouri, and

impairing the adequacy of the present transportation system of Kansas City, Missouri; the unnecessary duplication of railroad facilities at a great cost.

Petitioner submits it is impossible to conceive of a case wherein a city would be more directly and adversely affected by an unauthorized extension than under the facts set forth in petitioner's motion and proposed intervening petition. If petitioner is without sufficient standing, then no one, other than a competing carrier, would ever be deemed to be a "party in interest" and thus entitled to maintain such a suit. The decision of the court below amounts to a holding that a city cannot be a "party in interest," entitled under the Interstate Commerce Act to maintain an action to enjoin an unauthorized extension of line. This construction of the statute is erroneous in face of the purpose of the statute and the previous decisions of this Court. It is inconsistent with the purposes of Congress in passing the Interstate Commerce Act. The action of Union Pacific Railroad Company in promoting the building of a food terminal and in constructing terminal facilities and extending its railroad lines, is the direct cause of an immediate and direct financial loss to petitioner. Without this extension no such loss would arise. The motion to intervene and the proposed intervening petition clearly state that the combined action of Union Pacific and Kansas City, Kansas, in constructing and operating the food terminal and the railroad extension, which is an integral part thereof, will cause, or may cause, the direct financial loss to Kansas City, Missouri, which loss is set out in detail therein.

Judge Stone cited *Western Pacific California Railroad Co.* v. *Southern Pacific Company, supra,* as being the holding of this Court that *direct financial loss caused to a party was sufficient to bring that party within the*

terms of the Act, whereupon he said that such financial loss is clearly stated in the motion and the intervening petition of petitioner.

Petitioner urges that its complaint and its motion to intervene show that the construction and operation of the proposed extension will directly and adversely affect property interests and rights of petitioner; will cause it to suffer a financial loss; and will bring about a material change in the transportation system which will constitute an unnecessary burden upon interstate commerce and directly and adversely affect the welfare and rights of petitioner.

2. Both the intervening motion and the proposed intervening complaint are sufficient in law and state a claim upon which relief can be granted.[3]

Petitioner believes that it has shown under the preceding points that the petitioner is a party in interest within the meaning of the Act and is entitled to intervene in and maintain this action. This being true, the motion to intervene and the intervening complaint are sufficient in law, and state a cause of action upon which relief can be granted. Petitioner believes that there can be no question but that the motion to intervene and the proposed intervening complaint amply meet the requirements of the new rules of civil procedure for District Courts and are sufficient in law, and state a cause of action entitling petitioner to have the case heard upon the merits. Peti-

[3]New Federal Rule 24 provides for intervention of right and a permissive intervention. Intervention of right is permitted upon timely application (1) when a statute of the United States confers an unconditional right to intervene, or (2) when the representation of applicant's interest by existing parties is, or may be, inadequate and applicant is, or may be, bound by the judgment in question. Permissive intervention is permitted upon timely application (1) when a statute of the United States confers a conditional right to intervene, or (2) when an applicant's claim or defense has the main action for a question of law or fact in common.

tioner believes that to reach a contrary conclusion it is necessary either to disregard the allegations of the complaint or to hold, as a matter of law, that a municipal corporation cannot be adversely affected by a material change in a transportation situation vital to its economic survival and to its existing property interests and rights.

VII.

Conclusion.

Petitioner believes that it has, by its motion to intervene and its proposed intervening petition, presented to the District Court on the pleadings its right to intervene and maintain the action. The only objection raised to the petitioner going to trial is based on the contention that petitioner is not a party in interest under paragraph (20) of Section 1 of the Transportation Act.

In view of the purpose and intent of the Transportation Act, and in view of the former decisions of this Court, petitioner urges this Court to hold that it is a party in interest entitled to intervene in and maintain the suit in question. In other words, petitioner urges this Court to find that Congress meant by the term "any party in interest," a municipal corporation who, under the circumstances of the motion and petition here, has suffered, or will suffer, a direct, adverse, immediate loss by this unauthorized, and thus unlawful, extension of a line of railroad causing a material change in the transportation situation.

Petitioner further urges that the opinion and judgment of the court below should be reversed so that the petitioner may be permitted to intervene and to offer proof of its interest and to show in what respects and to what extent its welfare may be directly and adversely affected

by the unlawful extension of the railroad lines of Union Pacific Railroad Company, and what direct and adverse loss the petitioner will suffer.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1940.

No. 35.

KANSAS CITY, MISSOURI, a Municipal Corporation,
Petitioner,

vs.

L. SINGER & SONS ET AL., *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

Petitioner Kansas City, Missouri, has filed its brief in this case. The answer brief of respondent Union Pacific Railroad Company, filed in opposition thereto, brings forward for the first time a new contention which petitioner thinks is clearly untenable. It is to this new contention solely that petitioner addresses this argument. Petitioner's original brief, it feels, sufficiently covers all other questions involved in this case.

I.

Respondent's new contention.

Respondent Union Pacific Railroad Company, at page 15 of its brief (Case No. 35), raises for the first time the contention that "The order of the District Court denying petitioner's motion to intervene is not appealable."

This, says respondent, is true because the refusal of the District Court to permit intervention was a pure exercise of discretion which did not adjudicate any of the petitioner's rights and the order of that court was not a final adjudication. Respondent Union Pacific Railroad Company then argues that any right petitioner might have had against respondent was neither lost nor prejudiced by the order denying intervention, and, therefore, the ruling against petitioner was not in the nature of a final adjudication, and thus the Circuit Court of Appeals had no jurisdiction to review the ruling under Section 225 of Title 28, U. S. C. A., which provides for appeals only from a final adjudication.[1] Respondent then says that although the District Court may have assigned the wrong reason for giving the ruling, and the United States Circuit Court of Appeals for the Eighth Circuit may have assigned the wrong reason for upholding the ruling, the ruling must nevertheless stand.

A review of the record of this case and an analysis of the action of the two lower courts and of respondent will immediately reveal that respondent's position is untenable. It is now for the first time that respondent is urging

[1]Section 225 of Title 28, U. S. C. A., provides that:

"The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal final decisions—

First. In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

this new contention. The contention is but an afterthought which is wholly inconsistent with respondent's previous theory of the case and with the treatment of the case by both respondent and the two lower courts. Not only is it inconsistent with the theory and treatment of the case as expressed by respondent and both lower courts, but also respondent by having failed to brief, argue and present the question to the intermediate appellate court, and by having failed to present it to this Court in its brief in opposition to petitioner's petition for writ of certiorari, has placed itself upon record that the contention is not in this case, and hence respondent cannot inject it into this case at this stage of the proceeding.

II.

The ruling of the District Court was an adjudication that petitioner has failed to state a cause of action under paragraph (20) of Section 1 of the Transportation Act of 1920, and therefore is a final ruling and order from which an appeal can be taken.

As will be brought out throughout the remainder of this reply brief, both the District Court and the intermediate appellate court have ruled upon but one question. That question is whether or not petitioner Kansas City, Missouri, has a cause of action under paragraph (20) of Section 1 of the Transportation Act of 1920. Whether or not petitioner Kansas City has a cause of action under that Act depends upon the question of whether or not Kansas City is a "party in interest" under that Act. Both the District Court and the intermediate appellate court specifically ruled and decided that petitioner did not have a cause of action under said Transportation Act because it was not a party in interest within the

meaning and intent of that Act. This ruling of those two courts is clearly on the merits of the asserted cause of action of petitioner. It is a final adjudication from which an appeal can be taken. Such a ruling is a final determination of the cause and if allowed to stand makes *res judicata* the question of whether petitioner has alleged a cause of action under paragraph 20, Section 1 of the Transportation Act of 1920. The order did not provide that the dismissal of petitioner's intervening petition was without prejudice, nor can any such meaning be read into it.

Respondent Union Pacific Railroad Company urges for the first time now that the District Court exercised a discretion in refusing to allow petitioner to intervene notwithstanding the inescapable fact that said court ruled that petitioner was not a party in interest under the Transportation Act so as to maintain the action. This contention of respondent is utterly unsound. The District Court, in ruling that petitioner Kansas City, Missouri, had no cause of action under the Transportation Act because it was not a party in interest within the meaning of that Act, became bound in law to dismiss petitioner's motion and petition. If petitioner had no cause of action under said Transportation Act, the trial judge had no discretion in the matter at all, and after such a determination, could not go into the question of whether or not petitioner had, as it claimed, an absolute right to intervene, or had only a permissive right to intervene. The ruling of the District Court was to the effect that it had no discretion at all to exercise, for if petitioner had failed to state a cause of action, no intervention could be allowed under any circumstances, and there could be no consideration—no exercise of discretion—as to whether or not the petitioner could intervene. The ruling of the

District Court was that petitioner Kansas City, Missouri, was not a party in interest under the Transportation Act, and therefore did not have a cause of action. Under that ruling, petitioner could not maintain an independent action of its own. Naturally under such a ruling petitioner could not intervene in any other action. Upon that theory the trial court saw no need to determine *any* further question when it had already determined that petitioner had failed to state a cause of action. The rule is well established that where a trial court refuses to exercise its discretion for the reason that it considers that it has no power to do so, such refusal is error from which an appeal may be taken. *Mattox* v. *United States*, 146 U. S. 140, 138 S. Ct. 50; *Felton* v. *Spiro*, (C. C. A. 6th) 78 Fed. 576.

We think it too clear for argument that if this appeal were here dismissed the petitioner would not then be able to go back and file in the District Court a new proceeding independent of L. Singer & Sons *et al.* without being met with a bar of prior adjudication, because the question of the right of this petitioner to maintain an action under the facts alleged has been finally determined by the District Court and affirmed by the Circuit Court of Appeals for the Eighth Circuit.

III.

Respondent, by proceeding upon the theory (as have both lower courts) that the action of the District Court was a final adjudication of the question of whether or not petitioner has stated a cause of action under paragraph (20) of Section 1 of the Transportation Act, has bound itself to that theory and cannot now abandon that theory and course of conduct and attempt at this time to urge a decision upon this new and conflicting theory.

(A) Analysis of pleadings, briefs and courts' action below.

In the motion of Kansas City, Missouri, for leave to intervene as plaintiff (R. 5), Kansas City alleged that it had the unconditional right to intervene under Section 1, paragraph (20) of the Interstate Commerce Act of 1920. Kansas City further alleged that it had the unconditional right to intervene under the Judicial Code, Sections 212, 213 Amended (Title 28, U. S. C. A., Section 45a). Petitioner further stated therein that it had an absolute right to intervene because petitioner's representations by existing parties were or may be inadequate and that petitioner was or may be bound by judgment in the action. Petitioner then stated that if those statutes do not confer an unconditional right to intervene, petitioner had a conditional right to intervene because the main action and petitioner's claims had questions of law or fact in common and the intervention would not unduly delay or prejudice the adjudication of the rights of the original parties thereto. The remainder of petitioner's motion and its intervening petition stated the petitioner's cause of action under paragraph 20 of Section 1 of the Transportation Act of 1920, which allows any party in interest to bring suit to enjoin a railroad from constructing or operating an extension without having first secured a certificate of convenience and necessity from the Inter-

state Commerce Commission therefor. Respondent Union Pacific Railroad Company then filed its answer (R. 18). This answer challenged the original petition on its merits.

While respondent filed no pleading directed against petitioner's motion to intervene or its proposed intervening petition, the respondent Union Pacific Railroad Company concedes that petitioner's motion to intervene and intervening petition includes all of the allegations of the original complaint of L. Singer & Sons *et al.* (Respondent's brief, pages 4, 7). The District Court ruled and treated the answer of respondent filed in the original proceeding as in effect the answer to petitioner's motion and its intervening petition. Respondent in its answer contended, first, that the District Court had no jurisdiction over the subject matter of the proposed action averred in the complaint of L. Singer & Sons (Case No. 34); second, that plaintiffs (L. Singer & Sons *et al.*) are not parties in interest under the provisions of paragraph (20) of Section 1 of the Commerce Act; third, that the complaint of L. Singer & Sons *et al.* failed to state a claim upon which relief could be granted; fourth, a general denial, with certain allegations of the petition excepted therefrom.

Respondent Union Pacific Railroad Company then filed an application to the court to hear and determine before trial the first three defenses of its answer (R. 22). The application of respondent was granted as revealed by the decree (R. 23). The court, treating this answer and the defenses raised therein as going to the motion of petitioner for leave to intervene and to petitioner's intervening petition, held: First, that it had jurisdiction in the matter; second, that plaintiffs (L. Singer & Sons *et al.*) are not parties in interest, and therefore their complaint failed to state a claim upon which any relief

could be granted; and third, that petitioner Kansas City, Missouri, *"is not a party in interest authorized to maintain* or intervene in *said action"* and therefore its motion to intervene was denied and its complaint dismissed at the cost of plaintiffs (Italics ours) (R. 23).

The District Court in its memorandum opinion (R. 25 at 27) ruled that there was but one question in the case as appears from the following language:

> "The complaint and motion to intervene disclose that neither plaintiffs, nor the City of Kansas City, Missouri, are engaged in the transportation business. It further appears that neither the property or confines of either are touched, encroached upon or directly affected by the proposed construction of the so-called 'extensions.' *There is no violation of any definite legal right alleged. Therefore, neither plaintiffs nor the City of Kansas City, Missouri, may maintain this action.* (Citations.) Since neither the United States, the Interstate Commerce Commission, the Public Service Commission of Missouri or Kansas, or any party directly interested is a party plaintiff to this action it may not be maintained and must be dismissed and the motion to intervene denied. (Sec. 1, par. 20, Title 49, U. S. C. A., *supra.*)" (Italics ours.)

Thus, clearly the District Court has ruled adversely upon the merits of Kansas City, Missouri's, contention that it is a party in interest under paragraph (20) of Section 1 of the Transportation Act of 1920 and as such it has the right to enjoin respondent Union Pacific from constructing or operating an extension without respondent first having secured a certificate of convenience and necessity therefor. *The trial court ruled that Kansas City, Missouri, under paragraph 20 of Section 1 of the Trans-*

portation Act, had asserted no cause of action. (Italics ours.)

L. Singer & Sons *et al.* then appealed on the ground that they were parties in interest under paragraph (20) of Section 1 of the Transportation Act (R. 24). Petitioner appealed from the District Court's ruling that petitioner was not a party in interest under that Act so as to be authorized to maintain or intervene in the action, and from the ruling dismissing the complaint (R. 25).

On November 7, 1939, the cause came on regularly for hearing in the intermediate appellate court (R. 32). After hearing the case on appeal, the Eighth Federal Circuit Court of Appeals, in its majority opinion, stated:

> "The appeals challenge (1) the action of the court in considering in advance of trial the defenses sustained; (2) the ruling that the plaintiffs and the City are not 'parties in interest'; and (3) the ruling that the complaint fails to state a claim upon which relief can be granted."

The majority opinion then said that since they (the writers of the majority opinion) conclude from both the complaint of L. Singer & Sons "and the complaint in intervention tendered by the City that the plaintiffs and the City are without capacity to maintain the suit and that therefore no relief could be afforded them, the court below was justified in entering a decree of dismissal in advance of trial" (R. 34).

The majority opinion next stated:

> "The vital question in these cases is whether the plaintiffs and the City are 'parties in interest' within the meaning of paragraph (20), Sec. 402 of the Transportation Act * * *."

The Court, after setting out the two petitions and motion, then said:

> "It is the plaintiffs' contention that any one whose welfare is adversely affected or threatened by the unauthorized extension of a railroad is a 'party in interest' who may maintain such a suit as this. The defendant, on the other hand, contends broadly that no one is a 'party in interest' who cannot point to the violation of some legal duty owing by the railroad to him. *We concern ourselves only with the question whether the plaintiffs and Kansas City, Missouri, are 'parties in interest' within the meaning of the statute authorizing 'any party in interest' to maintain such a suit.*" (Italics ours.)

Likewise, Judge Kimbrough Stone, in his dissenting opinion, considered the case as involving this sole question.

In the brief of respondent Union Pacific Railroad Company, filed in the Eighth Federal Circuit Court of Appeals, respondent's entire argument went to the question of whether or not Kansas City, Missouri, had a right of action or cause of action under the statutes relied upon by petitioner Kansas City, Missouri. (Note particularly conclusion, page 39, and summary of respondent's contention, page 7 of brief of respondent filed in Eighth Federal Circuit Court of Appeals.) Nowhere in that brief did the respondent make any contention or any mention that petitioner Kansas City had no right to appeal from the order of the District Court. Nowhere in that brief did respondent make any contention or suggestion that the District Court's action in regard to petitioner's motion to intervene and its intervening petition was not appealable. Nowhere in that brief did respondent contend or suggest that petitioner's rights were not finally adjudicated by the District Court's action. On the contrary,

respondent went under the assumption and acted on the premise that the action taken by the District Court with respect to petitioner's motion and intervening petition was appealable, and respondent concerned itself solely with the question of whether or not the District Court was in error in ruling that the Transportation Act failed to give petitioner Kansas City, Missouri, a cause of action. Respondent failed to file a motion to dismiss the appeal of petitioner as it undoubtedly should have done if it had entertained any question as to petitioner's right to appeal.

Petitioner next filed in this Court its petition for writ of certiorari to the Eighth Federal Circuit Court of Appeals, alleging therein that the Eighth Circuit Court of Appeals by its majority opinion was in error in ruling and in sustaining the ruling of the District Court that petitioner was not a "party in interest" under the Transportation Act and that, therefore, the petition failed to state a cause of action and that the petition should be dismissed (page 10, petitioner's petition for writ of certiorari; page 17).

In the brief of respondent Union Pacific Railroad Company in opposition to petition for writ of certiorari of petitioner, respondent likewise confined itself to the single question of whether or not petitioner was a party in interest under paragraph (20) of Section 1 of the Transportation Act so as to be able to maintain the action. Respondent at no time made any contention in that brief that the order of the District Court, denying petitioner's motion to intervene and dismissing the petition, was not appealable.

In said brief, respondent, in making its summary of the opinion of the intermediate appellate court, said:

> "The Court of Appeals, affirming the order of the District Court, held that petitioner was not a 'party in interest' within the meaning of paragraph (20) who could maintain this action."

In the same brief, on page 8, in summarizing that opinion, respondent said:

> *"The Court held that petitioner had not sustained legal injury which would give it the right to complain,* and accordingly affirmed a decree of the District Court *dismissing the complaint and denying petitioner's motion because it had not sustained any legal injury."* (Italics ours.)

From the foregoing it is clear that respondent Union Pacific Railroad Company has entered into the presentation of this case to the intermediate appellate court and to this Court in its brief in opposition to the petition for writ of certiorari upon the theory that the only question for determination was whether or not, on the pleadings of petitioner filed in the District Court, petitioner was a party in interest under paragraph (20), Section 1 of the Transportation Act so as to have a cause of action against respondent. Respondent cannot now at this late date abandon its own theory and cause of action which has been accepted by the intermediate appellate court and relied on in this Court in opposing the issuance of its writ of certiorari.

This Court held in the case of *Lynch* v. *The United States,* 292 U. S. 571, 54 S. Ct. 840, that where an action was brought in the lower court to recover money under a war risk insurance policy and the defendant therein failed to call to the court's attention the fact that the very act which created the rights under that policy limited the bringing of an action thereunder to five (5) years

after the breach thereof, that defense could not be raised in this Court even though the contention is that it goes to the question of whether or not the plaintiff stated a cause of action. This Court said, on page 587 and page 588 of its opinion:

> "*Seventh.* The Solicitor General concedes that in No. 861 no question is presented except that of jurisdiction dependent upon the construction of the Clause in Sec. 17 of the Economy Act discussed above. He contends in No. 855, that if jurisdiction is entertained, the demurrer should be sustained on the ground that the complaint fails to set forth a good cause of action, since it fails to show that the suit was brought within the period allowed by law. This alleged defect was not pleaded or brought to the attention of either of the courts below. Nor was it brought by the Solicitor General to the attention of this Court when opposing the petition for a writ of certiorari. We do not pass upon that question, which like others relating to the merits, will be open for consideration by the lower courts upon the remand."

This Court also discussed, at page 589 of its opinion, the question of whether or not certain recently enacted statutes had any bearing upon the cause. As to them, this Court said:

> "The provision in the Act of March 27-28, 1934, was enacted after the filing in this Court of the petitions for certiorari, but before the writs were granted. As neither of these Acts was referred to by the Solicitor General or by counsel for the petitioners, we assume that there is nothing in them, or in any action taken thereunder, which should affect the disposition of the cases now before us. Any such matter also will be open for consideration by the lower courts upon the remand."

See also:

Delaware, etc., Railroad v. *Koske*, 279 U. S. 7, 49 S. Ct. 202.

Thus this Court has recognized that by failing to raise a particular defense in the intermediate appellate court and in the brief filed in this Court in opposition to the petition for writ of certiorari, the particular defense will not be considered by this Court, but may be considered by the District Court in the event the case is remanded. Particularly should that be true where the District Court, by the nature of its ruling, has not yet considered the question of whether or not petitioner has the absolute right to intervene or only a discretionary right to intervene for the reason that the District Court determined erroneously that, inasmuch as petitioner had no cause of action, its motion and petition must be dismissed. The District Court may well go into the question of absolute and permissive right to intervene upon the remanding of this cause to it, and in fact that will be the first time that it will ever have considered this question.

IV.

The cases respondent cites as holding that the action of the District Court in denying petitioner's motion to intervene and dismissing its intervening motion and petition is not appealable actually hold that such action is appealable.

The cases cited by respondent reveal that the action of the District Court here in question is appealable. Respondent cannot deny that the action of the District Court amounted to an adjudication on the merits of petitioner's cause of action. Petitioner can appeal from such adjudication. Further, the cases cited by respond-

ent, and which respondent states deal with the right to appeal where the Court refused intervention as a matter of discretion, reveal that there are three situations where such an order refusing permissive intervention is appealable. Those situations are:

First: Where the District Court treats the petitioner as having intervened even though the intervention was never allowed as of record. Respondent's own case of *Ex parte Cutting*, 94 U. S. 14, held that mandamus will not lie to control the discretion of a District Court in refusing or granting an order to intervene or to compel it to allow an appeal from such proper exercise of its discretion to a person not an original party to the suit unless it appears that the person's petition to be allowed to intervene was granted *or that said person acted or was treated as a party.* (Italics ours.) On page 20 of its opinion, the Court said:

> "We are aware that there are cases in which persons have been treated as parties to a suit after having filed a petition for leave to come in, when no formal order admitting them appears in the record, but in all such cases it will be found that they have acted or have been recognized as parties in the subsequent proceedings in the case. Thus, in *Myers* v. *Penn*, 5 Wall. 205, 'the petitions were filed without any order of the court, but no objection was made, and the hearing went on as if an order had been granted;' and in *Harrison* v. *Nixon*, 9 Pet. 491, *'inquiries were made as to the respective claims'* as asked for, and *'as to all parties who were claimants before the court by bill, petition, or otherwise,* their complaint, petition, and proceedings were dismissed.'" (Italics ours.)

"* * While it is not necessary for him (petitioner) to show that he has actually been admitted by

an express order entered upon the record, he must at least make it appear that he has acted or has been treated as a party."

Second: Respondent also cites *City of New York* v. *New York Telephone Company*, 261 U. S. 312. The facts of that case are entirely different from those here, but in ruling upon those facts, this Court, on pages 316, 317 of its opinion, recognized that an appeal may be taken from such an order to determine whether or not, if the trial judge were exercising a discretionary right in ruling upon a motion to intervene, he had abused that discretionary power. The Court said:

> "There is nothing to show that the refusal complained of was an abuse of discretion. * * *"

The Court next cites three (3) of the cases cited herein by respondent: *Ex parte Cutting*, 94 U. S. 14; *Credits Commutation Co.* v. *United States*, 177 U. S. 311; *Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578, and says:

> *"These cases show that exceptional circumstances may make an order denying intervention in a suit a final and appealable order, but the present is not one of them."* (Italics ours.)

Third: Respondent cites *Credits Commutation Co.* v. *United States*, 177 U. S. 311. In this case, in determining whether or not petitioners had the right to appeal from an order refusing intervention, this Court determined whether or not the order of the District Court had adjudicated any of the petitioners' rights asserted in their petition as if upon a demurrer thereto. On page 314 of the opinion, this Court said:

> "It is urged that the Circuit Court declined to treat the subject as of one of discretion, and elected to determine the legal rights of the petitioners, * * * and that, therefore, its judgment was a final one and properly reviewable on appeal."

This Court held that inasmuch as the Circuit Court of Appeals itself in its opinion had not treated the order as being a final determination of the merits of the claim on which the intervention is based, but left the petitioner at full liberty to assert his rights in any further order of proceedings, that such order lacked the finality necessary to support an appeal.

This Court said that since the Circuit Court of Appeals had treated it in that light, and since it (the Supreme Court) thought that said Circuit Court of Appeals had treated it in the proper manner, the appeal could not be taken. In other words, this Court has recognized as a converse that if an order is made which has been treated by the Circuit Court of Appeals and by the parties as being a final order, and it is in fact a final order, an appeal lies from that order.

Respondent has fallen into the error of taking the language of a headnote or the broad language of the particular case as being all-inclusive and meant to apply to any and every factual situation, whereas an analysis of each case cited by respondent reveals that the particular ruling was intended to apply only to the special facts of that case. This Court recognized in every case cited by respondent that where the order of the District Court considers and decides the merits of the petition of the intervener, an appeal lies from such order.

Although petitioner does not wish to burden this Court with further citations, appeals are also allowed from a denial of a motion to intervene where the right of inter-

vention is discretionary where, first, it is clear from the pleadings and the proceedings that the District Court has abused its discretion in denying the intervention; second, where the District Court, under a mistake of law, erroneously rules that it has no discretion to permit intervention and refuses intervention on that basis solely, when in fact under the law it does have such discretion. *Mattox* v. *United States,* 146 U. S. 140; *Felton* v. *Spiro,* 78 F. 576. Further, it is obvious that the intermediate appellate court must have jurisdiction to decide whether or not the District Court erred in its ruling, if it should make one, that the claimed right of intervention was not an absolute right of intervention, but only one that rested in the discretion of the trial court. *Shepherd* v. *St. Louis Public Service Co.,* (C. C. A. 8th) 64 F. (2d) 612; *Universal Ins. Co.* v. *Old Time Molasses Co.,* (C. C. A. 5th) 46 F. (2d) 925. In the latter case, the Court said:

> "The appellees cannot complain of the absence of a formal order permitting the filing of the petition of intervention, as they excepted to that petition on its merits, and thereby evoked a decision of the court having the effect of a denial of any relief sought by the appellant. *In re Cutting,* 94 U. S. 14; *Texas & Pacific Co.* v. *Cox,* 145 U. S. 593, 603."

V.

Conclusion.

The ruling of the District Court that petitioner was not a party in interest under paragraph (20) of Section 1 of the Transportation Act and therefore could not maintain the action, was a ruling that petitioner had failed to state a cause of action. This ruling is of such a binding and final nature as to be clearly one from which

an appeal can be taken. It did not involve the exercise of any discretion by the District Court. Further, by proceeding in the intermediate appellate court and in this Court in its brief in opposition to the petition for writ of certiorari, upon the theory that the action of the District Court with regard to petitioner was an adjudication that petitioner had no cause of action under said Transportation Act, respondent must confine itself now to the submission of that question alone, and if it has other questions which it deems are pertinent, must wait until the cause is remanded to the District Court and raise them as of that time.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1939.

No. [redacted] 35

KANSAS CITY, MISSOURI, a Municipal Corporation,
Petitioner,

vs.

L. SINGER & SONS, a Corporation, ET AL., *Respondents.*

BRIEF OF UNION PACIFIC RAILROAD COMPANY, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In the

Supreme Court of the United States

October Term, 1939.

No. 826.

KANSAS CITY, MISSOURI, a Municipal Corporation,
Petitioner,

vs.

L. SINGER & SONS, a Corporation, ET AL., *Respondents.*

BRIEF OF UNION PACIFIC RAILROAD COMPANY, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 109 Fed. (2d) 493. The opinion of the District Court for the Western District of Missouri is reported in 26 Fed. Supp. 721.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioner's Motion to Intervene and the Intervening Complaint.

Petitioner seeks a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review an order of said court affirming an order of the District Court denying petitioner's motion for leave to intervene in the case of *L. Singer & Sons, a Corporation, et al., plaintiffs,* v. *Union Pacific Railroad Co., a Corporation, defendant,* in which case the District Court entered a decree dismissing the complaint (R. 25). The plaintiffs in that case have petitioned this court for a writ of certiorari, which case is docketed as *L. Singer & Sons, a Corporation et al., petitioners,* v. *Union Pacific Railroad Company, a Corporation, respondent,* No. 825 (Supreme Court docket). In that case plaintiffs complained of the construction of tracks serving a produce market in Kansas City, Kansas, on account of damage to their property and business which they asserted would be occasioned to them because of competition which would thereby result, and the plaintiffs there sought to enjoin appellee Railroad Company from constructing said tracks appurtenant to the market. The petitioner in this suit sought to intervene in that case, and in its motion and proposed intervention, as will hereinafter be noticed, adopted in all substantial particulars the allegations of the complaint in that case. To avoid unnecessary repetition of the analysis of the complaint and the questions presented thereby and determined in that case, we respectfully direct the attention of this court to the brief of respondent in

case No. 825 (Supreme Court docket), where the Court will find a full discussion of the questions presented therein. This case, involving the single question of the right of petitioner to intervene, must be considered in connection with case No. 825, which is the main case. A repetition of the arguments and citations there made would inexcusably increase the burden of this court so that counsel respectfully requests, for that reason, that the two cases in so far as common questions be concerned be considered together.

Petitioner asserted in its motion to intervene that paragraph (20) of Section 1 of the Interstate Commerce Act (Title 49, U. S. C. A.) conferred upon it an unconditional right to intervene, because of the alleged interest of petitioner set forth in paragraphs 5(a) to 5(h), inclusive, of the motion (R. 5). The grounds alleged by petitioner as the basis of its asserted right to intervene, as asserted in said paragraphs, are;

(a) A petition was filed with petitioner's city manager on January 9, 1939, by forty-one produce merchants, property owners and business men, requesting that petitioner intervene in said case, and pursuant to which a resolution was adopted by the city counsel authorizing it to draft and file such pleadings as it may conceive necessary;

(b) On May 26, 1931, the people of Kansas City, Missouri, voted a half million dollars in bonds to be used in the construction of a new wholesale and retail market which is now under construction in said city;

(c) For seventy-five years there has been built up in Kansas City, Missouri, a large volume of business and a great number of merchants engaged in buying and selling fruits, vegetables and other food products at

wholesale and retail around the city market; that said merchants have invested in real estate, buildings and improvements; and that said market has been equipped with adequate transportation service and is more than adequate to supply the demand of adjacent territories to Kansas City, Missouri;

(d) That it is the proposed plan or scheme of the respondent Union Pacific Railroad Company to promote the erection of a competing market center in Kansas City, Kansas, and to build the necessary extension of its lines to serve the same whereby it will be enabled to divert revenues from Kansas City, Missouri, and from the persons engaged in said wholesale and retail produce business there, whereby there will accrue to respondent a large diversion of freight from the territory in Kansas City, Missouri;

(e) That the persons engaged in the produce business and otherwise pay large amounts of real estate, personal and occupation taxes and if respondent Railroad Company is permitted to proceed with the promotion of the Kansas City, Kansas, market without obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission, Kansas City, Missouri, will be in danger of losing a large amount of the revenues from the payment of taxes due to the fact that many of the produce merchants will remove from Kansas City, Missouri, and carry on their business in said competing center;

(f) That the aforesaid reasons, (a) to (e), inclusive, constitute questions of law and fact in common with the city's interests and cause of action set forth in the complaint of L. Singer & Sons *et al.*;

(g) That the representation of petitioner's interests by L. Singer & Sons and others, for the foregoing reasons, is inadequate and as to the right of respondent Railroad Company to construct said alleged extension, a judgment in this action would be binding upon petitioner, *there being no public or quasi-public body with any interest in the subject-matter which could adequately represent Kansas City, Missouri, as a party to this suit;*

(h) That the foregoing statements show the need of petitioner "to intervene to protect the public interest of its residents and in order that the process of this court shall not unduly prejudice their interests."

Attached to and forming a part of appellee's motion to intervene was its intervening petition (R. 12), the first eleven paragraphs of which are, in all substantial particulars, identical with the allegations of the main complaint, which has already been analyzed by us in case No. 825 (Supreme Court docket) and which, for purposes of brevity, will not be repeated here.

We will, therefore, consider in this statement the supplementary matter which appellant has injected in its intervening petition. In paragraph 12 (R. 19) it is alleged that neither the Interstate Commerce Commission nor the State of Missouri nor any commission or board of the State of Kansas or of the State of Missouri has instituted any proceeding to secure the relief sought in this action, and that therefore appellant brings this suit. It alleges further that it brings this suit on its own behalf and on behalf of all the citizens and taxpayers in Kansas City, Missouri, who have a common and general interest in this proceeding. It is apparently petitioner's theory that because the United States, the Interstate Commerce Commission and the duly authorized regulatory bodies of the

states of Missouri and Kansas have brought no proceeding, that petitioner is, therefore, authorized to bring such proceeding on behalf of its citizens. In substance, the allegations of the motion and the intervening petition are substantially identical with the allegations of the complaint.

Petitioner contends that because of these grounds it is entitled to relief under paragraph (20), Section 1, of the Transportation Act of 1920 (49 U. S. C. A.), enjoining respondent from constructing the tracks in question, because of the failure of respondent to secure a certificate of convenience and necessity authorizing such construction, as required by paragraph (20) of said section (R. 19).

The Statutes Involved.

Petitioner averred in its motion that respondent had failed to secure a certificate of public convenience and necessity for the construction of the trackage, as required by paragraph (18), Section 1, of the Transportation Act of 1920, which provides as follows:

> "(18) No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad or the construction of a new line of railroad, or shall acquire any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or

the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

The petitioner contends that because of the failure of respondent to secure a certificate of public convenience and necessity it is a party in interest within the meaning of paragraph (20) of the Transportation Act of 1920, which provides as follows:

"(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance or the certificate such terms and conditions as in its judgment the public convenience and necessity may require. * * * carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed * * *. Any construction, operation or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commissioner or regulating body of the State or States affected, or any party in interest; * * *."

Summary of Opinion of Circuit Court of Appeals.

The Court of Appeals, affirming the order of the District Court, held that petitioner was not a "party in interest" within the meaning of paragraph (20) who could maintain this action. It predicated its decision upon the rulings of this Court in *Western Pacific* v.

Southern Pacific, 284 U. S. 47, and *Texas and Pacific Ry. Co.* v. *Gulf, Colorado and Santa* Fe, 270 U. S. 266. It held that although the public welfare may be affected by reason of the competitive conditions which might ensue in the produce business and because of a material change being brought about in the transportation situation due to the construction of the alleged extension, yet petitioner had no right to complain because its motion and complaint disclosed that its own welfare could not be directly, but only indirectly and consequentially, affected by the alleged extension (109 Fed. [2d], l. c. 496). The court pointed out that petitioner's welfare could not be directly affected by the proposed extension because it was not in competition with respondent and not engaged in the transportation business. Its concern was mainly the effect upon its revenue of changes which might be brought about because of the construction of a market competing with a similar enterprise already in operation within its city limits. The court held that petitioner had not sustained legal injury which would give it the right to complain (l. c. 496) and accordingly affirmed a decree of the district court dismissing the complaint and denying petitioner's motion because it had not sustained any legal injury.

THE PETITION FOR CERTIORARI.

The petitioner contends that certiorari should be granted by this Court for the following reasons:

1. The decision of the Court of Appeals is in conflict with the decision of this Court in *Western Pacific* v. *Southern Pacific, supra,* and *Texas and Pacific* v. *Gulf-Colorado and Santa Fe, supra,* and 2, That the interpretation of "party in interest" is an important question which this Court should determine and answer.

REASONS RELIED ON FOR DENIAL OF CERTIORARI.

Respondent contends that the petition for certiorari should be denied on the following grounds:

(1) The holding of this Court in *Western Pacific* v. *Southern Pacific,* 284 U. S. 47, that a carrier whose welfare might be directly affected could maintain an action under paragraph (20), Section 1, of the Transportation Act of 1920 to enjoin a competing carrier from invading its territory, and the holding of this Court in *Texas and Pacific Ry. Co.* v. *Gulf-Colorado & Santa Fe Ry. Co.,* 270 U. S. 266, to the same effect were expressly followed by the Circuit Court of Appeals in its decision below, and no conflict is presented; and

(2) The questions as to who may maintain an action as a party in interest and who may represent the public interest has been settled by a long line of decisions by this Court and needs no further exposition or interpretation by this Court in this case.

ARGUMENT.

I.

The holding of this Court in *Western Pacific v. Southern Pacific, supra*, that a carrier whose welfare might be directly affected could maintain an action under paragraph 20, Section 1, Transportation Act of 1920, to enjoin a competing carrier from invading its territory, and the holding of this Court in *Texas & Pacific Ry. Co. v. Gulf-Colorado & Santa Fe Ry. Co., supra*, to the same effect, were expressly followed by the Circuit Court of Appeals in its decision below, and no conflict is presented.

Petitioner unsuccessfully urged in both the District Court and the Circuit Court of Appeals that because its welfare might be adversely affected on account of the possible loss of tax revenue which might result from the competition engendered by the construction of the Kansas City, Kansas, market and the tracks in question serving the same, it was a party in interest within the purview of paragraph 20 and hence authorized to maintain the suit. Petitioner is not a common carrier whose territory will be invaded by the proposed construction. It points out no right created by the Act which has been threatened or violated by respondent. It contends that all that is necessary to bring it in as a party in interest is that its welfare may be adversely affected.

Petitioner claims that the ruling of this Court in *Western Pacific* v. *Southern Pacific, supra,* supported this contention, but a consideration of the facts in that case and the ruling of this Court clearly demonstrates that the decision has no such scope or effect. In that case the West-

ern Pacific had applied to the Interstate Commerce Commission for a certificate of convenience and necessity authorizing it to construct a railroad into a territory contiguous to that then served by it. During the pendency of the proceedings before the Commission the Southern Pacific commenced the construction of a rail line into the same territory proposed to be served by the Western Pacific in its application to the Commission. Western Pacific brought proceedings to enjoin, under paragraph 20, on the ground that its territory was to be invaded and that the proposed construction by Southern Pacific had not been authorized by the Commission. It was asserted by the Southern Pacific that the Western Pacific was a mere paper railroad and hence was not authorized to maintain the action. It was pointed out, however, in answer to that contention, that the application filed by Western Pacific with the Commission was the first step it could take in order to secure authority to construct the track and the location of its line had already been fixed by surveys. In response to that contention this Court ruled that the welfare of the Western Pacific was directly affected by the proposed construction.

The basis of this decision is apparent. It was that the territory of the Western Pacific was to be invaded by unauthorized competition. This Court had previously ruled in *Texas & Pacific Ry. Co.* v. *Gulf Colorado & Santa Fe Ry. Co., supra,* that prior to the enactment of the Transportation Act of 1920, *no carrier* could claim exemption from honest competition. That Act conferred a legal right upon an interstate carrier to be exempt from unauthorized competition, and consequently a carrier whose territory was to be invaded by another carrier through unauthorized competition was a party in interest whose right created by the Transportation Act had been di-

rectly violated and threatened, and such carrier could consequently enjoin said unauthorized competition.

This Court in *Western Pacific* v. *Southern Pacific, supra,* evinced no purpose to depart from the decision in *Texas & Pacific Ry. Co.* v. *Gulf-Colorado & Santa Fe Ry. Co., supra,* or other cases in which the same rule has been applied. It is manifest that if anyone other than a carrier whose welfare might be adversely affected, this petitioner contends, could maintain an action under paragraph 20, then the plain language and historical purpose of the Transportation Act must be ignored.

In the enactment of the Transportation Act of 1920, the dominant objective of Congress was the maintenance and preservation of an adequate and efficient national transportation service in the public interest. At the time of the passage of this Act the railroads of the country had just been returned to private ownership from Government operation during the war. Congress realized that if a national transportation system was to be maintained, extensions of railroads or acquisition of railroads by carriers should be regulated, because improvident expenditures for such purposes might seriously impair the financial ability of the carriers to maintain essential transportation service.(1)

Hence, the Interstate Commerce Commission was the agency selected to control and regulate carriers in the extension of their railroads or the acquisition of new railroads. Public convenience and necessity was to control the judgment of the Commission in applications for authority. Penalties were prescribed for violations (Par. 18, Sec. 1) and the civil remedy of a right to enjoin was conferred by paragraph 20 (see *Powell* v. *United States,* 300

(1) *California R. Com.* v. *Southern Pac. Co.,* 264 U. S. 331; *St. Louis Southwestern Ry. Co.* v. *Missouri Pacific Ry. Co.,* 289 U. S. 82.

U. S. 276). The United States, the Interstate Commerce Commission, any regulatory body of the state or states affected, and any party in interest might secure such injunctive relief.

The public interest in the protection of the transportation system is the dominant idea of the enactment and the agencies delegated with the duty of enforcing civil remedies conferred by paragraph 20 are the United States, Interstate Commerce Commission and any regulatory body of the state or states affected. Petitioner claims that traffic will be diverted from other railroads to respondent, that respondent is making an improvident expenditure for the construction of the tracks in question, and that a material change in the transportation system will occur. In the main, these are all matters which affect public interest which may be asserted by those charged by Congress with the duty of protecting public interest and not by private individuals. The paragraph was not construed by this Court in *Western Pacific* v. *Southern Pacific, supra,* or in any other case, as giving to a private citizen the right to advocate the cause of the public.

Conceivably, the damage that will result to other railroads, as asserted by petitioner, is one which might be claimed by a competing railroad who would suffer such diversion of traffic because of competition between the markets (see *Texas & Pacific Ry. Co.* v. *Gulf-Colorado & Santa Fe Ry. Co., supra*), but petitioner will no more be heard to advocate the cause of a competing railroad than it will be to espouse a public right under the avowed interest of law enforcement.

We submit that this Court, in *Western Pacific* v. *Southern Pacific, supra,* did not, either expressly or inferentially, hold that anyone who might assert his welfare may be adversely affected could avail himself of the remedy

to enjoin, prescribed by paragraph 20.[2] Furthermore, it is questionable that the city's welfare will be even *indirectly* affected, because the decline of taxable property values in one part of the city will necessarily be compensated for by increased levies elsewhere in the city, and it will be the *public,* not the city, whose welfare is concerned.

The contention of petitioner is untenable, not only because the language of the opinion, considered in the light of the questions before this Court, is not susceptible of such construction, but also that such construction would do violence to the legislative purpose in the enactment of the Transportation Act of 1920. *Western Pacific* v. *Southern Pacific, supra,* is in consonance with the other decisions of this Court of the right of an interested carrier to enjoin unauthorized competition and was given full effect by the Court of Appeals in its decision of this case.[3]

---

(2) The court expressly said at l. c. 51: "On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complaint must possess something more than a common concern for obedience to law." The court held it would suffice "if the bill disclosed some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful act of the defendant carrier may *directly* and adversely affect the complainant's welfare by bringing about some material change in the transportation system." (Italics ours.)

(3) The Circuit Court of Appeals quoted at length from this Court's opinion in *Western Pacific* v. *Southern Pacific, supra,* and in expressly following the rule of that case said (R. 48): "The complaint in intervention tendered by Kansas City Missouri, shows that with respect to the proposed extension it stands in substantially the same position as the plaintiffs. Its market place will be injured by the establishment of the rival market, and the taxable values in the city will decline with a resulting loss of revenue. The proposed extension, however, can only be the *remote* cause of the injuries which the city fears." (Italics ours.)

II.

The question as to who may maintain an action as a party in interest and who may represent the public interest has been settled by a long line of decisions of this Court and needs no further exposition or interpretation by the court in this case.

Petitioner asserts that it is a party in interest and, therefore, is authorized to maintain the action because its welfare may be adversely affected by reason of the possibility of a loss of tax revenue which may result from competition on account of the construction of the Kansas City, Kansas, market. It points to no statute, contract or other basis of legal right which it could claim entitles it to have located in its city a market which will exclusively serve not only the residents of Kansas City, Missouri, but also the residents of Kansas City, Kansas, and other areas. In short, it asserts no *direct legal injury*. It merely claims an indirect injury because its welfare may be consequentially affected. From this it argues that it is a party in interest.

That petitioner is not a party in interest in its own behalf is established by the many cases discussed at length under point II of our brief in case number 823, and we shall not needlessly burden this court by a repetition of such discussion here.[4]

The city charges in paragraph (g) of its motion (R. 9) that there is no public or *quasi*-public body which could

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[4] *Alabama Power Company* v. *Ickes*, 302 U. S. 464; *Tennessee Electric Power Company* v. *Tennessee Valley Authority*, 306 U. S. 118; *Railroad Company* v. *Ellerman*, 105 U. S. 166; *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, 109; *Arkansas-Missouri Power Company* v. *City of Kennett*, 78 Fed. (2d) 911 (C. C. A. 8); *United States ex rel. New York Warehouse* v. *Dern, Secretary of War*, 68 Fed. (2d) 773 (D. C. App.); *Carolina Power & Light Company* v. *South Carolina Public Service Authority*, 94 Fed. (2d) 520 (C. C. A. 4); *West Tennessee Power & Light Company* v. *City of Jackson*, 97 Fed. (2d) 979 (C. C. A. 6); *Edward Hines* v. *United States*, 263 U. S. 143.

adequately represent appellant as a party to the suit and that it should be permitted to intervene "to protect the public interests of its residents and in order that the process of this court shall not unduly prejudice their interest." It is urged that petitioner is entitled to intervene to protect the public interest. This contention is made despite the fact that the plain language of paragraph (20) confers no right of intervention on the city to protect the public interest. That section provides that any violation of paragraphs (18) or (19) may be enjoined by any court of competent jurisdiction "at the suit of the United States, the Commission, any commission or regulatory body of the State or States affected * * *." Undoubtedly in the enactment of the section Congress felt that the governmental authorities designated were entirely adequate to protect the public interest. If they are not, then the remedy is with Congress through amendment and not by judicial interpolation. The designation of the governmental agencies to represent the public interest must of course be held exclusive of all other governmental agencies for said purpose. Neither by express designation therein nor reasonable implication can it be said that paragraph (20) authorizes a city to invoke the remedy of injunction thereby granted for an alleged violation of paragraphs (18) and (19) of Section 1 of the Interstate Commerce Act.

The agencies designated by the statute, however, are given this authority to the exclusion of all others not named. (See *Botany Mills* v. *United States,* 278 U. S., l. c. 289).

As heretofore stated, the allegations of the motion and intervening petition are substantially identical with the allegations of the main complaint. The injury supposed and which petitioner seeks to avert by its interven-

tion is the competition which will result in the vegetable and fruit commission business, or possibly to carriers other than respondent serving Kansas City, Missouri, but petitioner is one step farther removed from this supposed injury than are the plaintiffs in case No. 825. It was demonstrated in our brief in that case that petitioners therein have no rights which are directly violated or menaced because of the competition ensuing by reason of the market. This petitioner, being one step farther removed than are the parties in that case, certainly would possess no greater rights. In substance, the sole basis of petitioner's motion and intervening petition is the supposed injury that will result to the commission merchants who have memorialized it to intervene in this suit for the protection of the citizens' alleged rights, and the damage to other carriers which petitioner has injected as a subject of great concern to it. But even assuming, *arguenda,* that the plaintiffs in case No. 825 had rights which were being violated, the city is not a party which can litigate that action in behalf of those who claim injury.

Such was the holding in *State of Oklahoma* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 220 U. S. 277, wherein the State of Oklahoma, acting on behalf of its citizens who were shippers, brought an action against the railroad company to restrain it from charging unreasonable rates within the state. This court there held that the state, not being engaged in the transportation business or in the sale of products, was not authorized to maintain the suit to redress grievances concerning property or rights of its citizens.

That the appellant has no authority as a party in interest within the meaning of paragraph (20) to intervene to

litigate a purported cause of action asserted by its citizens is illustrated by *Georgetown* v. *Alexandria Canal Co.*, 37 U. S. 91, which was a suit brought by the City of Georgetown, on behalf of itself and its citizens, against the Canal Company alleging that the latter was constructing an aqueduct across the Potomac River within the corporate limits of the city; that the canal was a public highway which could be freely used by the citizens. The bill prayed an injunction against the Canal Company to restrain it from building the aqueduct. This court there held that the city could not maintain the action because it could show no right to obtain redress for grievances of others.

To the same effect are *Smiley* v. *Kansas*, 196 U. S. 447, l. c. 457; *United States* v. *Smelser*, 87 Fed. (2d) 799, l. c. 800 (C. C. A. 5); and *Radford Iron Co.* v. *Appalachian Electric Power Co.*, 62 Fed. (2d) 940, l. c. 942 (C. C. A. 4).

Petitioner here is in no different situation than was the plaintiff Railroad Company in *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, wherein it complained of the effect upon shippers of reductions in rates made by the Commission. The Court disposed of the claim in a single sentence saying that it would not listen to a party who complains of a grievance which is not his.

It was held in *Powell* v. *United States*, 300 U. S. 276, that the remedy afforded by paragraph (20) was exclusive in the persons upon whom the same was thereby expressly conferred. Speaking of this paragraph, this Court recognized that a suit may be filed only by the United States, the Commission, any regulating body of the state affected, or any party in interest (l. c. 288), and,

again speaking of paragraph (20), it said (l. c. 289) respecting the remedy afforded by the paragraph, that "the latter is exclusive."

The real objective of the appellant in intervening is disclosed by the resolution adopted by its Council in which it is stated, with reference to the Kansas City, Kansas, Food Terminal, that

> "WHEREAS, the proposed Food Terminal in Kansas city, Kansas, would merely divide the present market business without increasing the number of consumers or the amount of shipments to or from Greater Kansas City or its trade territory, would greatly decrease property values and would be a wasteful duplication of existing market facilities and those now being constructed in Kansas City, Missouri, out of the bonds voted as aforesaid" (R. 10).

The complaint is that the present market business would be divided and there would be a wasteful duplication of existing market facilities. Therefore, the grievance of the appellant is that the construction of the Kansas City, Kansas, market will provide competition to the Kansas City, Missouri, market, thereby resulting in a division of the present market business and with a wasteful duplication of market facilities. For the same reasons as stated in our brief in Case No. 825, petitioner cannot complain of competition in the market business. It possesses no exclusive or non-exclusive right to engage in the ownership and operation of a market. The absurdity of its position is obvious. On petitioner's theory the City of Kansas City, Kansas, having determined to erect a market, might enjoin the City of Kansas City, Missouri, from erecting a market because of the possible competition that would ensue and the attendant evils of wasteful duplica-

tion of existing market facilities. Petitioner could resort to injunctive process against other cities to restrain the construction of markets where those markets would draw consumers or shippers from the Kansas City market, based on its solicitude for the economic welfare of its commission merchants. Clearly there is no *direct or even indirect* violation of any right of the city because neither for itself nor for its commission merchants has it any monopoly in the operation of a market or the commission business. We cannot believe that this Court will hesitate in reaching the conclusion that Kansas City, Kansas, or any other city for that matter, may build markets without the probability of being haled before the bar of this Court to make a showing that they are not competing with petitioner or its citizens residing within its corporate limits and that the facilities which they are building are not a wasteful duplication of the facilities in Kansas City, Missouri.

Petitioner is not concerned with the building of the tracks, all of which are located in Kansas City, Kansas. The tracks alone would afford no competition, even on its theory. According to the allegations of the motion and the intervening petition the transportation facilities at its market have been and will be adequate. The complaint is leveled solely at the competition which will result to commission merchants on account of the building of the Food Terminal in Kansas City, Kansas. It has been pointed out that the commission merchants have no legal right to be free from competition, from which it follows that the city has no greater right to insist that its residents who are engaged in the commission business shall be free from competition than the latter have.

In concluding, we submit that the city has no right of intervention unconditionally or permissibly under para-

graph (20) of Section 1 of the Interstate Commerce Act, because:

(1) The city is not authorized by that section to bring any action to redress a public wrong, such redress being confined exclusively by the paragraph to the United States, the commission, any commission or regulatory body of the state or states affected;

(2) The city possesses no power to redress the alleged private wrongs of its citizens; and

(3) The city is not a party in interest within the meaning of the paragraph because of any competition that would result on account of the construction of the Food Terminal in Kansas City, Kansas, with the tracks as facilities thereto.

Conclusion.

The decision of the Court of Appeals follows the rule promulgated by this Court in *Western Pacific* v. *Southern Pacific, supra,* and *Texas & Pacific Ry.* v. *Gulf-Colorado & Santa Fe Ry. Co., supra,* by holding that only one whose welfare is *directly* threatened is a "party in interest" within Section 1 (20) of the Interstate Commerce Act. To have held otherwise would have violated the express holding by this Court in a long line of established cases. We submit that it is now unnecessary for this Court to reconsider a question which in numerous cases has already been decided plainly and concisely. The petition for certiorari should be denied.

Respectfully submitted,

A. C. Spencer,
Henry N. Ess,
Counsel for Respondent.

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In the

Supreme Court of the United States

October Term, 1940.

No. 35.

KANSAS CITY, MISSOURI, a Municipal Corporation,
Petitioner,

vs.

L. SINGER & SONS ET AL., *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF RESPONDENT UNION PACIFIC RAILROAD COMPANY.

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In the

Supreme Court of the United States

October Term, 1940.

No. 35.

KANSAS CITY, MISSOURI, a Municipal Corporation,
Petitioner,

vs.

L. SINGER & SONS ET AL., *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF RESPONDENT UNION PACIFIC RAILROAD COMPANY.

I.

THE OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit appears in the record beginning at page 33 and is reported in 109 F. (2d) 493. The opinion of the District Court for the Western District of Missouri appears in the record at page 25 and is reported in 26 F. Supp. 721.

II.

JURISDICTION.

This cause is before this Court upon a writ of certiorari issued by this Court to the United States Circuit Court of Appeals for the Eighth Circuit, under authority of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1939 (C. 229, 43 Stat. 936, 28 U. S. C. A., 347).

III.

THE STATUTES INVOLVED.

Petitioner asserts its right to intervene under paragraph 20, Section 1 of the Transportation Act 1920 (41 Stat., Section 478, 49 U. S. C. A., paragraph 20, Section 1) authorizes

> "the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; * * *."

to invoke the remedy by injunction conferred by this section to enjoin a violation of paragraph 18, Section 1 of the Transportation Act 1920 (49 U. S. C. A., §1, par. 18) which, among other things, prohibits a carrier by railroad from extending its line of railroad without first securing a certificate of convenience and necessity from the Interstate Commerce Commission. A full copy of the paragraphs in question is set forth in the appendix to this brief.

IV.

STATEMENT OF THE CASE.

Nature of the Case.

L. Singer & Sons, and others, who are produce commission merchants doing business on the Kansas City, Missouri, market, and others who own property at that market, brought suit in the District Court of the United States for the Western District of Missouri, against the Union Pacific Railroad Company, under paragraphs 18 to 20, Section 1 of the Transportation Act 1920 (49 U. S. C. A., paragraphs 18 to 20, Section 1) to enjoin the construction of an alleged extension to its railroad asserted to be built to serve a food market built by the City of Kansas City, Kansas, in that city. That case is upon the docket of this Court as No. 34. Petitioner herein, asserting a right to intervene in that case under paragraphs 18 and 20 of Section 1 of the Act, filed a motion to intervene in that case, to which its intervening petition was attached. The District Court denied petitioner's motion to intervene (R. 22-23; 26 F. Supp. 721) and the Circuit Court of Appeals, in a separate appeal taken by petitioner from the order denying intervention, affirmed (R. 33, 40, 45-47; 109 F. [2d] 493). The question presented for decision in this case is whether petitioner has an unconditional right or a permissive right to intervene in this action under any statute and whether petitioner is a "party in interest" who may intervene on the grounds asserted in the motion and the intervening petition attached thereto.

Inasmuch as petitioner in this case has included in its intervening petition all of the allegations of the com-

plaint in Case No. 34, in which the motion to intervene was filed, this respondent's brief in this case will be confined to argument that the grounds presented in the motion to intervene and the supplementary allegations of the intervening petition are insufficient. Petitioner's brief in this case, insofar as the argument invokes the allegations of the complaint and the argument of petitioners in Case No. 34, has been fully answered by respondent in that case and will not be repeated here, to avoid needless repetition. Petitioner in this case has been served with a copy of respondent's brief in Case No. 34 so that its counsel may be fully advised.

The Motion to Intervene.

Petitioner asserted in its motion to intervene that paragraph 20 of Section 1 of the Transportation Act 1920 conferred upon it the unconditi al right to intervene in this action because of the interest of petitioner set forth in paragraphs 5 (a) to 5 (h) of its motion (R. 9). These grounds are:

(a) That a petition was filed with petitioner's City Manager on January 9, 1939, by 41 produce merchants, property owners and businessmen, requesting that petitioner intervene in the case, in pursuance of which a resolution was adopted by petitioner's council authorizing it to intervene and to file such pleadings as it may deem necessary;

(b) On May 26, 1931, the people of Kansas City, Missouri, voted one-half million dollars to be used in the construction of a new wholesale and retail market which is now under construction;

(c) For 75 years there has been built up a large volume of business and a great number of merchants engaged in

buying and selling fruits, vegetables and other food products at wholesale and retail around the City Market, and that there are a great number of firms engaged in businesses connected with and having a direct relation to the business of said market; that the wholesale and retail produce merchants and other firms have invested in real estate, buildings and improvements; that the market has been equipped for years with more than adequate rail and transportation service, storage facilities, loading docks, team tracks and other appurtenances necessary to a marketing center having a large urban population; that said market is serving numerous adjacent territories to Kansas City in the State of Missouri; that said market is accessible to all portions of the surrounding territory by hard-surfaced roads and steam and electric transportation; and that such facilities have been more than adequate to supply the demand and such will be the case for years to come;

(d) That it is the proposed plan and scheme of respondent, Union Pacific Railroad Company, to promote the erection of a competing market center in Kansas City, Kansas, and to build the necessary extension of its lines to serve the same, whereby it will be enabled to control the operation of the market and divert revenues from Kansas City, Missouri, and from the persons engaged in said wholesale and retail produce business and its complementary industries, and that there will thereby accrue to respondent a large amount of freight and other revenue which will be diverted from the territory in Kansas City, Missouri;

(e) That the persons engaged in the produce business and otherwise pay large amounts in real estate, personal and occupation taxes, and if respondent is permitted to proceed with the promotion of the Kansas City, Kansas,

market without obtaining a certificate of convenience and necessity from the Interstate Commerce Commission, Kansas City, Missouri, will be in danger of losing a large amount of revenue from the payment of taxes, due to the fact that many of the produce merchants will remove from Kansas City, Missouri, and carry on their business in said competing center;

(f) That all of the aforesaid reasons (a to e), inclusive, constitute questions of law and fact in common with petitioner's interest and the cause of action set forth in the complaint of L. Singer & Sons *et al.*;

(g) That the representation of petitioner's interest by L. Singer & Sons for the foregoing reasons is inadequate and as to the right of respondent to construct said extensions, a judgment in this action would be binding upon petitioner, there being no public or *quasi* public party with any interest in the subject matter which could adequately represent Kansas City, Missouri, as a party to this suit;

(h) That the foregoing statements show the need of petitioner "to intervene to protect the public interests of its residents and in order that the process of this Court will not unduly prejudice their interest." (R. 7-9).

Petitioner's Intervening Petition.

Attached to and forming a part of petitioner's motion to intervene was its intervening petition (R. 11-18), the first 11 paragraphs of which (R. 11-17) are in all substantial particulars identical with the allegations of the main complaint, which is before this Court in Case No. 34, which have been analyzed in our brief in that case and, for that reason, as hereinbefore stated, we believe need not be repeated here. We will, therefore, consider in

this statement the supplementary matter which petitioner has injected in its intervening petition.

In paragraph 12 (R. 17-18) it is alleged that neither the Interstate Commerce Commission nor the State of Missouri, nor any Commission or Board of the State of Kansas, or of the State of Missouri, has instituted any proceeding to secure the relief sought in this action, and that therefore petitioner brings this suit. It alleges further that it brings this suit on its own behalf and on behalf of all the citizens and taxpayers in Kansas City, Missouri, who have a common and general interest in this proceeding. It is apparently petitioner's theory that because the United States, the Interstate Commerce Commission, and the duly authorized regulatory bodies of the States of Missouri and Kansas, have brought no proceeding, that petitioner is therefore authorized to bring such proceeding in behalf of its citizens.

Respondent's Contentions Respecting the Motion.

In the argument before both the District Court, in which the motion was denied (26 F. Supp. 721), and in the Circuit Court of Appeals, where the District Court's ruling on petitioner's separate appeal from the order denying intervention was affirmed (109 F. [2d] 493), respondent contended that the motion should be denied for the following reasons:

1. No intervention, either as a matter of right or permissibly, could be invoked by petitioner under paragraphs 18 to 20 of Section 1 of the Act, because these paragraphs (a) grant no unconditional right of intervention and (b) assuming permissive intervention is proper, the granting or denial of such intervention is a matter of discretion not reviewable in this case.

2. That the petitioner is not authorized by paragraphs 18 and 20 of Section 1 of the Transportation Act to intervene so far as the public interest may be concerned, because that right is conferred by the paragraphs solely on the United States and the governmental agencies therein specified, of which petitioner is not one of those designated;

3. That petitioner has no right to intervene to redress alleged private wrongs done to its citizens and that none of its legal rights have been invaded by respondent;

4. That if petitioner's complaint is the damage to the business and property of the petitioners in Case No. 34 before this Court, petitioner has no legal interest because not only is it one step farther removed than the petitioners in Case No. 34, but also in such case the petitioner would not be a party in interest who could complain of a competing market, for the reasons pointed out in respondent's brief in Case No. 34;

SUMMARY OF THE ARGUMENT.

1. Petitioner has no unconditional or permissive right of intervention and the order denying intervention is not appealable.

A. The right of intervention.

B. The order of the District Court denying petitioner's motion to intervene is not appealable.

2. The allegations of the motion and the complaint affirmatively disclose that petitioner has no right to intervene under paragraphs 18 to 20 in this action.

3. Petitioner has no legal right to redress alleged private wrongs done its citizens.

4. Petitioner has no right to intervene because of its desire to protect the public interest.

5. The cases cited by petitioner do not disclose the existence of any legal right.

6. Liberal construction of the statute contended for by petitioner.

ARGUMENT.

Petitioner has no unconditional or permissive right of intervention and the order denying intervention is not appealable.

A. The right of intervention.

Petitioner asserts in point I of its brief that it has the right to intervene in and maintain the action. Inasmuch as petitioner did not institute the action initially and sought only to intervene, the only question for decision in this case is whether petitioner may intervene in the action, which was brought under paragraphs 18 and 20 of Section 1 of the Act.

Rule 24 of the Rules of Civil Procedure govern the right of intervention. Paragraph (a) of that rule, dealing with intervention as of right, provides:

> "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof."

Neither paragraphs 18 or 20 of Section 1 confer any right of intervention, paragraph 18 providing that no carrier by railroad shall extend its line of railroad without securing a certificate of convenience and necessity from the Commission, and paragraph 20 giving certain regulatory agencies and any party in interest the right

to enjoin any construction in violation of paragraph 18. Hence, neither paragraphs 18 nor 20 confer any right to intervene and there is no other federal statute that confers such right. Therefore, petitioner does not come within the first subdivision of paragraph (a) of Rule 24.

Petitioner was free to file its petition as the first pleading in an independent suit. Any action which it might assert against respondent, under paragraphs 18 or 20, was neither lost nor prejudiced by the order of the Court denying the motion of petitioner to intervene.

No legal reason is pointed out in the motion to intervene why the representation by the produce commission merchants in the Singer case, No. 34, is inadequate. In fact, the allegations of the motion refute any idea of inadequacy, as will be noticed by an examination of the grounds of inadequacy therein stated. In its motion, petitioner alleged (a) that the representation of petitioner's interest by L. Singer & Sons *et al.*, is inadequate and because there is no public or *quasi* public body with any interest in the subject matter which could adequately represent petitioner as a party in this suit, petitioner should intervene; (b) that it is necessary for petitioner "to intervene to protect the public interest of its residents and in order that the process of the Court will not unduly prejudice their interest" (R. 6, 9).

Petitioner is not one of the public agencies designated by paragraph 20 to protect the public interest. That interest may be protected only by the agencies therein designated. The paragraph contains no provision that a city or any political subdivision of a state may institute an action under paragraph 20 if the agencies therein designated fail or refuse to institute such action. Therefore, ground (1), as stated in the motion, presents no legal reason why the representation by existing parties

is or may be inadequate insofar as petitioner is concerned.

The language of the statute precludes any right to intervention on the second ground, as above stated, where it is asserted petitioner seeks to intervene to protect the public interests of its residents and in order that the process of this Court will not unduly prejudice their interests. As to this claimed ground of intervention, again the answer is the language of paragraph 20 which does not authorize the petitioner to act to protect the interests of its residents. As stated before, only the public agencies designated therein are authorized to act.

Furthermore, inadequacy of representation gives no right to intervene unless the proposed intervener will be bound by the judgment in the pending suit. There is no privity between the original plaintiffs and Kansas City, Missouri. A judgment against the original plaintiffs would not bar the prosecution of a suit by the City. It follows that petitioner has no right to intervene under the second ground named in the rule.

Inasmuch as there is no property in the custody of the Court or of an officer thereof, concerning which petitioner is to be affected by a distribution thereof, petitioner does not come within the third subdivision of paragraph (a) of Rule 24. Therefore, we submit that it is made plain that petitioner does not have the unconditional right to intervene under paragraph (a) of Rule 24.

It is clear that petitioner is not entitled, as a matter of right, to a permissive intervention as prescribed by paragraph (b) of Rule 24 which provides:

> "Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense in the main action have a question of fact

or law in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

As to the first subdivision of paragraph (b), it is plain that no permissive right of intervention exists, because no statute of the United States, on which petitioner bases its right to intervene, confers a conditional right therefor. Neither paragraphs 18 nor 20 confer any right to intervene, so that petitioner may not rely on subdivision (1) of paragraph (b) of the Rule.

The matter of allowing permissive intervention under paragraph (b) of the Rule is discretionary. In exercising its discretion, the Court will consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. That means that in exercising its discretion the Court will give such a situation consideration. It constitutes no limitation on the power of the Court to otherwise exercise its discretion. The Court might very well consider the effect of delay and prejudice to the lawsuit, but in the exercise of its discretion, on other grounds, deny the motion to intervene, and the exercise of such discretion will not be considered by an appellate court.

In the District Court, the sufficiency of the complaint was heard and determined before consideration was given to petitioner's motion. When the District Court held that the complaint was insufficient, it denied petitioner's motion to intervene, which covered the grounds asserted therein and in the intervening petition, to which we will direct attention at pages 16 to 18, *infra*, in this brief. In such situation, it is respectfully submitted that petitioner is not entitled, as a matter of right, to permissive intervention under paragraph (b) of Rule 24.

B. The order of the District Court denying petitioner's motion to intervene is not appealable.

It has been pointed out that the District Court had the power, in the exercise of its discretion, to permit petitioner to intervene. It is, therefore, clear that the refusal of the Court to permit intervention was a pure exercise of discretion which did not adjudicate any of the petitioner's rights and that the order of the Court was not a final order. Any right which petitioner might have had against the respondent was neither lost nor prejudiced by the order denying intervention. For these reasons it has been held that no appeal will lie from an order of a Federal District Court refusing leave to intervene in a suit instituted by others where the right of intervention is merely permissive.

Credits Commutation Co. v. *United States*, 177 U. S. 311;
Guion v. *Liverpool, London & Globe Ins. Co.*, 109 U. S. 173;
New York City v. *New York Telephone Co.*, 261 U. S. 312;
Ex parte Leaf Tobacco Board of Trade, 222 U. S. 578;
In re Engelhard, 231 U. S. 646;
Ex parte Cutting, 94 U. S. 14.

Section 225 of Title 28, U. S. C. A., provides that:

> "The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—
> First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

This statute only authorizes an appeal when the judgment is final. It follows that petitioner was not entitled to appeal from the order of the District Court refusing

intervention. The Circuit Court of Appeals had no jurisdiction to reverse the order complained of by petitioner and that court did not do so. Therefore, the reasons given for allowing the order to stand are immaterial because the result was right. When the Court decides a case correctly but assigns the wrong reason therefor, the decision must stand.

St. Louis & San Francisco R. Co. v. *Brown,* 241 U. S. 223;
Helvering v. *Gowran,* 302 U. S. 238;
Frey & Son v. *Cudahy Packing Co.,* 256 U. S. 208;
U. S. v. *American Railway Express Co.,* 265 U. S. 425;
U. S. v. *Holt State Bank,* 270 U. S. 49;
Langnes v. *Green,* 282 U. S. 531;
Stelos Co. v. *Hosiery Motor-Mend Corp.,* 295 U. S. 237;
U. S. v. *Williams,* 278 U. S. 255;
Helvering v. *Rankin,* 295 U. S. 123;
General Utilities & Operating Co. v. *Helvering,* 296 U. S. 200.

It is submitted that petitioner having taken a separate appeal from the order denying intervention has no standing in this Court to challenge that ruling in the courts below because that order was not final, was not appealable and is therefore not subject to review in this case.

The allegations of the motion and the complaint affirmatively disclose that petitioner has no right to intervene under paragraphs 18 to 20 in this action.

Petitioner predicates its right to intervene under paragraphs 18 and 20, Section 1 of the Transportation Act 1920 upon the following grounds, alleged in its motion, which may be summarily stated:

1. That its City Council authorized it to intervene;

2. That its citizens had voted $500,000.00 in bonds to construct a new market, which it is now constructing;

3. That for 75 years a large volume of business in the purchase and sale of fruits, vegetables and other food products has been built up for the market; "that the market has been equipped for years with more than adequate rail and transportation service; and that such facilities have been more than adequate to supply the demand, and such will be the case for years to come";

4. That it is the plan and scheme of respondent to promote the erection of a competing market in Kansas City, Kansas, and to build the necessary extention of its lines to serve the same and thereby control the operation of the market and divert revenues from Kansas City, Missouri, and from the persons engaged in the produce business and complementary industries, and thereby respondent will receive a large amount of freight and other revenue which will be diverted from the territory in Kansas City, Missouri;

5. That the persons engaged in the produce business pay large amounts in real estate, personal and occupation taxes, and if respondent constructs the alleged extension, then petitioner will be deprived of those revenues because of the removal of the produce merchants now transacting business in the Kansas City market.

Two other grounds charging that it was petitioner's duty to protect the public interest will be discussed in the second subdivision of the argument immediately following.

And, in addition, petitioner asserted the same general grounds for relief alleged in the complaint of L. Singer & Sons, which have been analyzed and argued by this respondent in its brief filed by it in Case No. 34, on the

docket of this Court. The repetition here of that analysis and argument is omitted because as hereinbefore stated the Court has the matter before it in that case and a copy of respondent's brief in that case has been served upon petitioner in this case.

That petitioner's City Council had authorized it to intervene and that the citizens of petitioner had voted $500,000.00 in bonds to construct a new market, which it was now building (1) and (2), *supra,* are no legal reasons why petitioner should be authorized to intervene in this proceeding and need not be further noticed.

Likewise, the ground asserted in (3), *supra,* that for 75 years a large volume of produce business has been built up at the Kansas City market by a large number of firms engaged in business there and the market has been equipped for years "with more than adequate rail and transportation service, storage facilities, loading docks and team tracks, and that such facilities have been more than adequate to supply the demand and such will be the case for many years to come" likewise presents no grounds for intervention in this action by petitioner. This ground, as asserted by petitioner, refutes completely the idea that petitioner has sustained any legal damage, even assuming, *arguendo,* that it may assert legal damage by intervention under paragraphs 18 to 20 of Section 1, because it affirmatively states that the transportation facilities are more than adequate to serve its market now and for many years to come.

The other grounds of intervention will be separately discussed in the argument following.

Petitioner has no legal right to redress alleged private wrongs done its citizens.

In "4," *supra,* petitioner charges that in promoting the erection of a competing market in Kansas City, Kansas, and building the alleged extention of its railroad to serve the same, respondent will thereby divert revenues from the persons engaged in the wholesale and retail business and its complementary industries and that there will thereby accrue to respondent large amounts of revenue from freight and other sources which will be diverted from the Kansas City, Missouri, territory. Thus, petitioner contends that it is entitled to intervene on the ground that produce commission merchants and others engaged in complementary industries on the Kansas City, Missouri, market will suffer loss and damage because of the competition which will be caused to them by the Kansas City, Kansas, market. If, as we have demonstrated in our brief in *Singer & Sons* v. *Union Pacific Railroad Company,* Case No. 34, the produce commission merchants do not have the right to be free from competition (resp. brief, Case No. 34, pp. 10-16), then, certainly, petitioner may not maintain an action in behalf of its citizens to assert rights which they do not possess.

See:

Alabama Power Company v. *Ickes,* 302 U. S. 464;
Edward Hines Yellow Pine Trustees v. *United States,* 263 U. S. 143;
Tennessee Electric Power Co. v. *Tennessee Valley Authority,* 306 U. S. 118;
Railroad v. *Ellerman,* 105 U. S. 166;
Carolina Power & Light Co. v. *South Carolina Public Service Authority,* 94 F. (2d) 520 (C. C. A. 4);
West Tennessee Power & Light Co. v. *City of Jackson,* 97 F. (2d) 979 (C. C. A. 6).

Petitioner, being one step farther removed than are the petitioners in Case No. 34, would certainly possess no greater rights than those of the petitioners in that case. The petitioners in Case No. 34 having no right to be free from competition and consequently no right to maintain this action under paragraphs 18 to 20, the petitioner in this case obviously could not intervene.

But even though it be assumed, *arguendo*, that the commission merchants sustained legal injury, nevertheless, petitioner is not a party which can intervene in that action in behalf of those who claim injury. Petitioner is not authorized to maintain a suit to redress grievances concerning the property or legal rights of its citizens. This Court so held in *State of Oklahoma* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 220 U. S. 277, wherein the State of Oklahoma, acting in behalf of the citizens of the state who were shippers, brought an action against the railroad to restrain it from charging unreasonable rates within the state. This Court said, l. c. 286-7:

> "In the present case, the State seeks to enjoin the defendant company from charging more than the Kansas rates on the transportation of lime, cement, plaster, brick, stone, crude and refined oil. But the State, as such, in its governmental capacity, is not engaged in their sale or transportation, and has no property interest in such commodities. It seeks only, as between the railway company and shippers, by a general, comprehensive decree to enforce certain rates and to compel the railway company to respect the rights of *all* of the people of Oklahoma who may have occasion to ship such commodities over the railway."

This Court held that the State could not maintain the action in behalf of its citizens who had sustained legal injury.

The principle is further illustrated in *United States* v. *Smelser,* (C. C. A. 5) 87 F. (2d) 799, where suit was brought by the United States against a former referee in bankruptcy to recover multiple excessive fees paid to him from the funds of numerous estates. The suit was not based upon the bond which the referee had given. In both the District Court and the Circuit Court of Appeals, the allegation that the fees had been illegally paid to the referee was treated as admitted. Obviously, the parties who had been damaged by the alleged illegal exactions were the creditors of the estates whose assets were used for their payment. The question presented and decided was whether the United States had the right to maintain the action. In holding that the United States could not maintain the action, the Court said, l. c. 801:

> "To entitle a plaintiff to judgment, something more than a legal cause of action must exist; the right to maintain it must be in the person instituting the suit. In *United States* v. *Brainerd* (D. C.) 250 F. 1011, 1012, 1015, the court held that 'the sovereign in its representative capacity has no implied power to demand a general accounting for the purpose of impounding funds collected in excess of that by law allowed for the benefit of individuals entitled thereto, because the state, through its public officials, should not so assist either party in a private controversy.'"

It seems too plain for argument that neither a city nor a state, nor any political subdivison thereof, could lawfully assume either the prosecution or defense of actions involving redress for private wrongs done to or by its citizens. There are, of course, situations where statutes require actions involving private wrongs to be brought in the name of the sovereign for the use and benefit

of the party aggrieved. Such statutes, however, are nothing more than a procedural scheme which have for their purpose the prevention of a multiplicity of suits, such as federal statutes requiring a suit in the name of the United States against a contractor on a bond given by him to secure the faithful performance of a contract. But the authority in all such cases is of express statutory origin. Without it, the authority in the sovereign does not exist. Petitioner points to no statute conferring such authority. Its only claim to intervene is based upon paragraphs 18 to 20, which do not confer upon petitioner the right to maintain actions to redress alleged private wrongs of its citizens.

In the early case of *Georgetown* v. *Alexandria Canal Co.*, 37 U. S. 91, this principle was applied. That was a suit by the City of Georgetown on behalf of itself and its citizens, against the Canal Company, to enjoin the latter from constructing an aqueduct across the Potomac River within the limits of the city. It was alleged that the canal was a public highway which could be freely used by its citizens and that the construction of the aqueduct would interfere with such use. This Court said, l. c. 99:

> "With this principle as our guide, let us now examine the pretensions of the appellants in this case. Who are they? Not, indeed, a private person, but a corporation. They profess to come into court for themselves and for the citizens of Georgetown. Now, it is not even pretended, that in their character of a corporation only, they have any power or authority given to them by their charter, to take care of, protect and vindicate in a court of justice, the rights of the citizens of the town, in the enjoyment of their property, or in removing or preventing any annoyance to it. * * * The complainants,

> then, must, as in the case of private persons, to maintain their position in a court of equity for relief against a public nuisance, have averred and proved, that they were the owners of property liable to be affected by the nuisance, and that, in point of fact, were so affected, so as that they thereby had suffered a special damage. Now, there is no such averment in this bill. The appellants seem to have proceeded on the idea, that it appertained to them, as the corporate authority in Georgetown, to take care of and protect the interests of the citizens. In this idea, we think they were in error; and that they cannot, upon any principle of law, be recognized as parties competent in court to represent the interests of the citizens of Georgetown."

If legal injury has been done to petitioner's citizens, then the grievance is that of the citizens who have sustained legal injury and not that of petitioner. This Court, in *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, applied the applicable principle, l. c. 109, when it said:

> "We have said several times that we will not listen to a party who complains of a grievance which is not his."

Again, in *Smiley* v. *Kansas*, 196 U. S. 447, this Court held, l. c. 457:

> "He cannot be heard to object to the statute merely because it operates oppressively upon others. The hurt must be to himself. * * * Hence, unless appellant can show that he himself has been wrongfully included in the terms of the law, he can have no just ground of complaint. This is fundamental and decisively settled."

The resolution under which the petitioner attempted to intervene makes it plain that the reason for its intervention was the damage resulting to persons engaged on the market and to the owners of property. The pertinent portion of the resolution is:

> "Whereas, the proposed produce food terminal in Kansas City, Kansas, would merely divide the present market business, without increasing the number of consumers or the amount of shipments to or from Greater Kansas City or its trade territory, would greatly decrease property values and would be a wasteful duplication of existing market facilities and those now being constructed in Kansas City, Missouri, out of the bonds voted as aforesaid." (R. 10.)

Thus, if the petitioner is advocating the cause of the commission merchants whose business would be divided by a so-called "duplication" of market facilities and of the decrease in property value, petitioner would sustain no legal injury for the diminution in the produce business. That loss would fall upon the commission merchants. Likewise, petitioner would sustain no loss because of the decrease in property values. That loss would fall upon the property owners whose property had been diminished in value. In neither case could the petitioner redress the supposed wrongs done either the commission merchants or the property owners by the erection of the so-called duplicate market facilities. Those wrongs, if any there be, could be redressed only by those who had suffered legal injury.

Petitioner asserts in "5," *supra*, that if respondent is permitted to proceed with the construction of the alleged extension without securing a certificate of convenience and necessity from the Commission, that it will be in danger of losing a large amount of revenue from the

payment of taxes due to the fact that the property at and near the Kansas City, Missouri, market will depreciate in value, and many of the produce merchants will remove from Kansas City, Missouri, and carry on their business in the competing market. This ground affirmatively discloses no legal interest in petitioner. If, because of the removal of produce merchants from the Kansas City, Missouri, market to the Kansas City, Kansas, market, petitioner should sustain loss on account of diminution in tax revenues, the loss would not fall upon petitioner. Petitioner derives its support from taxes. If its income should be lessened for the reasons stated by it, then petitioner would be required to levy taxes in an amount sufficient to pay its operating expenses. Assuming, as petitioner contends, that its tax revenues would be decreased on account of the removal of its merchants and that, therefore, it would have to levy additional taxes to make up the deficiency, this burden would fall upon its citizens against whom the taxes are imposed and not upon petitioner. Again, petitioner is in the situation of advocating a supposed grievance of its citizens, which it clearly may not do unless expressly authorized by statute. If an anticipated loss of tax revenue would authorize the City to maintain this action, then the same anticipated loss would have justified the State of Oklahoma to maintain the suit in *State of Oklahoma* v. *Atchison, Topeka & Santa Fe Ry. Co., supra.*

Another reason why petitioner may not invoke paragraphs 18 to 20 to redress alleged private wrongs done to its citizens because of alleged damages to them occasioned by competition or by increased taxes, is that paragraphs 18 to 20 neither expressly nor inferentially confer such a right. It was the purpose of Congress to promote and develop rail transportation by the enactment of para-

graphs 18 and 20. It did not have any purpose to correct any supposed evils that existed because of competition between cities in industrial pursuits or to create causes of action resulting where one community was developed at the expense of another. See respondent's brief in Case No. 34 (pp. 16-28 thereof).

It is therefore submitted that the petitioner has no right, under paragraphs 18 to 20, to complain of the construction of duplicate market facilities and tracks appurtenant thereto, under paragraphs 18 to 20 of Section 1 of the Transportation Act, because (a) the petitioner, assuming, *arguendo*, the existence of legal wrong done to its citizens, may not redress that wrong in this case; and (b) neither the petitioner nor the produce merchants have sustained any legal injury because neither the petitioner nor the produce merchants have any legal immunity from competition alleged to be brought about by the construction of the market in Kansas City, Kansas; and (c) the diminution in tax revenues, which the petitioner will sustain by reason of the removal of the produce merchants to the Kansas City, Kansas, market, constitutes no actionable legal injury to petitioner for the reason that the increased tax burden occasioned thereby will not fall upon the petitioner, but upon the other citizens of the community, whose cause petitioner cannot maintain.

Petitioner has no right to intervene because of its desire to protect the public interest.

In its motion to intervene and in its proposed intervening petition, the petitioner alleges that its intervention in this cause is necessary to protect the public interest for the following reasons:

(1) There is no public or *quasi* public body with any interest in the subject matter which could adequately represent petitioner as a party in this suit (R. 9).

(2) That it is necessary for petitioner "to intervene to protect the public interests of its residents and in order that the process of this Court shall not unduly prejudice their interest". (R. 9).

(3) That "neither the Interstate Commerce Commission nor any Commission or relating [regulating] board of the state of Kansas or the state of Missouri has instituted any proceeding to compel the relief sought in this action * * *", (R. 17).

Petitioner is not one of the public agencies designated in paragraph 20 which is authorized to protect public interest. Congress entrusted this duty to the United States, the Interstate Commerce Commission, and the regulating bodies of any state or states affected. The protection of the public interest was considered to be adequately assured, by Congress, by its designation of the governmental and regulatory bodies therein named. Neither municipalities, other political subdivisions, nor any other public agency was given the right to act in the event the government or the other agencies named in the paragraph failed or refused to act. Therefore, the grounds for intervention asserted by petitioner that neither the Interstate Commerce Commission nor any regulating body of the States of Missouri or Kansas, nor any other public or *quasi* public body has acted, gives no ground to petitioner, under paragraphs 18 and 20, to act to protect the public interest. The following statement by this Court in *Botany Mills* v. *United States*, 278 U. S. 282, l. c. 289, is apt:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

We respectfully submit, for the foregoing reasons, that petitioner may not intervene for the protection of the public interest under paragraphs 18 and 20 on the grounds stated in its motion.

The cases cited by petitioner do not disclose the existence of any legal right.

The petitioner, as do the petitioners in L. Singer & Sons *et al.*, against this respondent, in Case No. 34 on the docket of this Court, relies strongly on *Western Pacific* v. *Southern Pacific Co.*, 284 U. S. 47. For the reasons given in respondent's brief in Case No. 34 (pp. 37-44 thereof), that the petitioners do not possess any legal right which is threatened or violated, we respectfully direct the attention of the Court to that brief to avoid repetition here.

It has never been held by any court that a city derived any legal right under the Transportation Act 1920 which would authorize it to secure an injunction against a carrier under the claim that a proposed extension of line would constitute an unlawful invasion of the territory of another carrier. No court, in any reported decision which we have been able to find, has held that a city acquired any legal right under paragraphs 18 and 20 of Section 1 of the Transportation Act 1920.

Petitioner cites *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, which, likewise, does not support petitioner, because that action was brought by a competing ferry company against the United States and the Interstate Commerce Commission before a specially constituted 3-judge court to enjoin the enforcement of an

order of the Commission authorizing a railroad company to establish and operate a ferry which it was asserted would invade the territory of the Ferry Company. There is certainly no analogy between the ferry company, engaged in the rendition of transportation services, whose territory was to be invaded by a competing railroad, to that of the petitioner in this case, which is not engaged in transportation and whose territory is not invaded.

Petitioner next cites *Atchison, etc., Ry. Co.* v. *Railroad Commission of California,* 283 U. S. 380, where the question was presented as to whether the Commission was authorized to issue a certificate under paragraph 18, except upon an application of the rail carriers. In that case the State of California and the city of Los Angeles were seeking to compel the railroads in the latter city to build a union passenger station, which involved an extension of their railroad, and, therefore, a certificate of convenience and necessity authorizing such extension. The carriers refused to file the application for the certificate. This Court held that either the state or the city had the right to file the application with the Commission. The question as to who was a party in interest under paragraph 20, to invoke the remedy by injunction, was in no way involved. This Court held that paragraphs 18 to 20 did not constitute any limitation upon the right of either a state or a city to apply to the Interstate Commerce Commission for a certificate of convenience and necessity authorizing a rail carrier to extend its line. In that case the state and city were attempting to exercise their admitted power to compel the maintenance of a union station. In this case the City seeks to assert the private rights of its private citizens and also to exercise power granted only to the United States and the public regulatory bodies.

Petitioner cites *Town of Inlet* v. *New York Central R. R. Co.*, 7 F. Supp. 781, which was an action brought under Sections 212-213 of the Judicial Code, as amended (Title 28, U. S. C. A., Section 45a), before a specially constituted 3-judge court to test the validity of an order authorizing the abandonment of a railroad. An examination of the opinion discloses that no question was raised or decided by the Court that the City could maintain the action. Petitioner's contention that the decision in that case is to be treated as decisive of the question of the existence of a legal right, under paragraphs 18 to 20, is similar to that rejected by this Court in *KVOS, Inc.*, v. *Associated Press*, 299 U. S. 269, where this Court held that the District Court did not have jurisdiction because the requisite jurisdictional amount was not involved. The Associated Press argued that the Court had taken jurisdiction in the case of *International News Service* v. *Associated Press*, 248 U. S. 215, and by so doing had held that the requisite jurisdictional amount was involved. In response to this contention, this Court said, l. c. 279:

> "But in that case the answer did not challenge the jurisdiction, there was no assignment of error raising the question and no argument on the subject was presented to the court. 'The most of that can be said is that the point was in the case if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'".

Thus, in *Town of Inlet* v. *New York Central Railroad, supra,* the question as to whether the plaintiff town was a party in interest was neither raised nor decided, as appears from the opinion. Other pertinent reasons why

this case does not support petitioner are (1) that the suit was brought by the Public Service Commission of the State of New York, which was admittedly a proper party in interest; (2) because the town, having been a party before the Interstate Commerce Commission, was expressly authorized by Sections 212-213 of the Judicial Code to become a party, and (3) no question was presented or decided as to whether a city was authorized, under paragraph 20 of Section 1, to institute a suit or intervene therein.

All of the other cases cited by petitioner and all of the statutes discussed in its brief have been argued by respondent in its brief in Case No. 34 (pp. 10-44 thereof).

Liberal construction of the statute contended for by petitioner.

The City claims that it is a party in interest, assigning as a reason therefor the nebulous argument that the act is highly remedial and must, therefore, be given a liberal construction. However, paragraph 20 of Section 1 is no more highly remedial than Section 45a which permits "any party or parties in interest to the proceeding before the commission" to appear as parties thereto "as of right" to contest or defend the validity of an order of the commission. Yet this Court has held in *Edward Hines Yellow Pine Trustees* v. *United States;* 263 U. S. 143, 148, that Section 45a did not authorize a lumber merchant to contest an order of the commission cancelling a penalty borne by the merchant's competitors although the cancellation of the charge may have subjected plaintiff to losses incident to more effective competition.

Petitioner claims that the Transportation Act was passed for the protection of those who pay the rates.

Those sections of the Act which require uniform rates and service were enacted for that purpose. But they were enacted to prevent railroads from playing into the hands of favored shippers by giving them advantages in rates and service which would enable them to more effectively stifle competition. In this case, petitioner claims that it may invoke the Transportation Act to enable it to stifle competition. This is the very thing that the Act seeks to prevent.

Petitioner claims that if respondent had made application to the commission for a certificate of public convenience and necessity it could have appeared in opposition to the application. Therefore, it is argued it may sue to enjoin the construction if no such application has been made.

Paragraph 19 of Section 1 provides that when an application for a certificate of public convenience and necessity is filed the commission shall publish notice in each county in or through which said line of railroad is constructed or operated. This is notice to the public in general and implies that anybody may be heard who is able to furnish the commission any information. However, paragraph 20 of Section 1 contains no such invitation to all the members of the public. It only grants the right to maintain a suit to enjoin the construction of the extension to "any party in interest." The fact that this restriction was omitted in paragraph 19 is due to the fact that the commission is an investigating body which may properly seek information wherever it is to be found, whereas the District Court is a judicial body which will not hear a complaint from one whose legal rights have not been invaded.

Petitioner claims that the wrong committed by respondent is not only the building of an unauthorized rail-

road extension, but also in joining with the city in building a market place. If the respondent acts *ultra vires* in building a market place, yet paragraph 20 offers no remedy therefor. Under that paragraph of Section 1 of the Transportation Act, no one may enjoin the building of a market place by a railroad company. The paragraph may only be invoked to enjoin the construction or operation of an unauthorized railroad extension.

A casual consideration of these arguments conclusively demonstrates that they constitute no reason why petitioner should have been permitted to intervene in this case. The ruling of the courts below denying such intervention was manifestly correct.

Conclusion.

Respondent respectfully submits that the decision of the Circuit Court of Appeals for the Eighth Circuit in this case should be affirmed because:

1. Petitioner has no unconditional right to intervene.

2. Petitioner's application to intervene as a plaintiff in this case was solely upon the ground that common questions of law and fact were involved in this case and in petitioner's alleged cause of action; therefore, the court's order denying intervention was an exercise of the court's discretion, it did not adjudicate any of plaintiff's rights, and it was not an appealable order.

3. No legal right was conferred upon petitioner by paragraphs 18 to 20 of Section 1 of the Transportation Act 1920 to be protected in its rents as a landlord of market stalls in Kansas City, Missouri.

4. No legal right was conferred upon petitioner by the paragraphs in question to protect the value of the market

in Kansas City, Missouri, to prevent competition by the market in Kansas City, Kansas.

5. Petitioner has no legal right to redress the alleged private wrongs done its citizens and, therefore, may not invoke such paragraphs of Section 1 of the Transportation Act 1920 for such purpose.

6. Petitioner has no right to intervene in this case because of its desire to protect the public interest. Neither has petitioner any redress on account of diminution of its tax revenues.

7. Petitioner, on the ground asserted in the complaint, may not complain of duplication of (a) railroad facilities; (b) diversion of traffic to respondent from other railroads; or (c) competition which will be brought about between respondent and other railroads by reason of the construction of the alleged extension, because these are all matters peculiarly within the concern of the public agencies designated in paragraph 20, or a competing railroad whose territory is to be invaded, and they are not of legal concern to petitioner.

8. The allegations of the petition to intervene and the proffered intervening petition affirmatively show that petitioner asserts no legal right conferred upon it by paragraphs 18 to 20 of Section 1 of the Transportation Act 1920, which has been or is about to be violated by respondent and, therefore, the principle of *damnum absque injuria* is applicable and petitioner therefore may not maintain the action.

It follows that petitioner does not come within the designation of "any party in interest," as that phrase was construed in *Edward Hines Yellow Pine Trustees* v.

United States, supra, and the other cases *supra,* and as used in paragraph 20 of Section 1 of the Transportation Act 1920, and that petitioner therefore may not maintain the purported cause of action alleged in the proffered complaint against respondent.

Respectfully submitted,

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T. W. BOCKES,
HENRY N. ESS,
Counsel for Respondent Union Pacific Railroad Company.

APPENDIX.

Paragraphs 18 and 20 of Section 1 of the Transportation Act 1920 are as follows:

"(18) *Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

"(20) *Issuance of certificate by commission; unlawful extension or abandonment of lines.* The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the

terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Mc Reynolds } 1,
Frankfurter } 1,
Stone } 1, 2, 7, 4,

SUPREME COURT OF THE UNITED STATES.

No. 34.—October Term, 1940.

L. Singer & Sons et al., Petitioners,
34 vs.
Union Pacific Railroad Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 16, 1940.]

Mr. Justice McReynolds delivered the opinion of the Court.

Undertaking to proceed under Paragraphs 18, 20 and 21, Section 402, Transportation Act, 1920[1] (41 Statutes 456, 477, U. S. C. Title 49, § 1) petitioners, by bill filed December 30, 1938, in the United States District Court, ~~Eastern~~ Western District of Missouri, asked a decree enjoining respondent from constructing or operating an alleged extension.

The bill describes them thus:—

"Plaintiffs are engaged in the business of buying and selling at wholesale and retail, fruits, vegetables and other food products within and adjacent to the so-called City Market of Kansas City, Missouri, located at and near the intersection of Fourth and Walnut Streets in said City, or are directly interested in or connected with said business. Said market has been in existence at said location for more than seventy-five years serving greater Kansas City and vicinity as a wholesale and retail produce market, and also serving numerous territories in other states to and from which perishable and other produce bought and sold in said market is transported. The City of Kansas City, Missouri, is now engaged in the

[1] Transportation Act, 1920, Sec. 402:

"Paragraph '(18) . . . no carrier by railroad subject to this Act shall undertake the extension of its line of railroad . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction . . . of such . . . extended line . . .' Paragraph '(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, . . .' Paragraph '(20) . . . Any construction . . . contrary to the provisions . . . of paragraph (18) . . . may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest. . . .'"

construction of new wholesale and retail market buildings and facilities in said vicinity at a cost of approximately 500,000.00. Said market is now and for a long period of time has been served by existing transportation facilities of various trunk line railroads, and said existing transportation facilities are suitable, convenient and adequate to meet the requirements of the market. The market is easily accessible to its customers through the facilities of said railroads and also by the use of streets and hard-surfaced highways radiating in every direction therefrom."

Answering, the respondent alleged that petitioners were not parties "in interest" within Paragraph 20, Sec. 402, Transportation Act and had no right to sue. The District Court sustained this defense and dismissed the bill. Upon appeal its action was affirmed. The matter is here by certiorari.

The Circuit Court of Appeals made the following summation of the bill—

"The complaint of the plaintiffs shows that they are commission merchants doing business on the Kansas City, Missouri, produce market, an old and well-established market which adequately serves the consuming public in its vicinity and receives produce from, and ships produce to, other states; that Kansas City, Missouri, is now engaged in constructing new market buildings for this market at at cost of about $500,000; that the market has suitable and adequate transportation facilities of all kinds; that the adjoining city of Kansas City, Kansas, proposes to build and is building a 'food Terminal' or produce market on a tract of land which it owns, at a cost of about $4,000,000, of which $1,710,000 is a grant from the Public Works Administration of the United States, and that the balance of the necessary funds will be procured by a sale of the City's bonds to the defendant railroad company; that the defendant proposes, at an expense of some $500,000, to furnish trackage to serve this Kansas City, Kansas, market; that this trackage constitutes an extension of the defendant's lines of railroad, for the construction of which it has procured no certificate of convenience and necessity from the Interstate Commerce Commission as required by law; that the construction and operation of the proposed extension in Kansas City, Kansas, will adversely affect and will destroy the business and properties of the plaintiffs and the large investments which they have made in and adjacent to the Kansas City, Missouri, produce market; that it will create an unnecessary and uncalled for rival market at an inconvenient place without creating any more produce to be handled or any more customers to be served; that it will result in the unnecessary duplication of railroad facilities at a cost of $500,000 without increasing the amount of freight to be handled; that it will divert traffic from other railroads which

are now adequately handling the traffic to the Kansas City, Missouri, produce market, and will cause destructive competition between the defendant and other railroads and will cause a wasteful and needless expenditure of money by the defendant; that 'for each and all of the reasons aforesaid, the construction and operation, or the construction, or the operation of the said extension or extensions of railroad by the defendant to said proposed produce market in Kansas City, Kansas, will directly and adversely affect the property interests of the plaintiffs and the public generally by bringing about a material change in the transportation situation, and will constitute an unnecessary burden upon interstate commerce directly and adversely affecting the welfare of plaintiffs and the public interest.'"

It is not alleged that the respondent has ever served the produce market in Kansas City, Missouri, or that petitioners make or receive shipments over its lines or that the proposed extension will deprive them of any shipping facilities. Evidently the real purpose was to obstruct construction of a competitor and the theory upon which the proceeding rests would permit petitioners to sue if any railroad should extend its lines to any market competing with the market at Kansas City, Missouri.

Concerning the purport of the allegations of the bill, the Circuit Court of Appeals rightly said:

"It is obvious that the only basis for the plaintiffs' claim that the alleged extension of the lines of the defendant to the Kansas City, Kansas, market will particularly injure them is that they do business upon the Kansas City, Missouri, market, and that if the proposed rival market in Kansas City, Kansas, functions, it will divert business from the market upon which they operate and will thus hurt them, their business, and their investments in Kansas City, Missouri, and that, since the proposed extension of its tracks by the defendant is necessary to enable the rival market to function, such extension will therefore injure the plaintiffs. It seems equally obvious that, except for the fact that the proposed extension is essential to the operation of the rival market in Kansas, it could not possibly have any direct or immediate effect upon the plaintiffs, their property or their business in Missouri, other than the effect which a wasteful expenditure by the defendant of its money would have upon the public generally. The proximate cause of the injury to the plaintiffs will be the competition created by the construction and operation of the rival market, and not the construction or operation of the transportation facilities furnished to it by the defendant or by others engaged in the transportation business."

It declared that the question whether petitioners were "parties in interest" within Paragraph 20 must be determined upon consideration of *Western Pacific* v. *Southern Pacific*, 284 U. S. 47, and concluded—

"The plaintiffs have no definite legal right which is threatened. They are, however, persons whose welfare may be adversely affected by the bringing about of a material change in the transportation situation, in the sense that the extension proposed by the defendant, if built and operated, will enable a competitive market to function to their detriment. In that sense, we think it may safely be said that the proposed extension of defendant's lines may adversely affect the plaintiffs' welfare. We are of the opinion, however, that their complaint discloses that their welfare cannot be directly, but only indirectly and consequentially, affected by the proposed extension. They are not in competition with the defendant. They are not engaged in the transportation business. Their only peculiar interest in that business is in the effect which changes in it may have upon the market where they do business and upon rival markets now or hereafter established in the territory which the plaintiffs serve. . . . We conclude that the statute is not to be so liberally construed as to enable those who fear adverse effects upon their business from the establishment of competitive enterprises requiring transportation facilities, to maintain suits to enjoin railroads from constructing what are claimed to be unauthorized extensions to serve such enterprises."

A dissenting opinion by Judge Stone likewise relied upon *Western Pacific California Railroad Co.* v. *Southern Pacific Company*, but took the view that the challenged action might directly and substantially affect petitioners' welfare since their financial interests would suffer from the proposed rival market which could not come into existence without the proposed extension.

The purpose and effect of paragraphs 18, 20 and 21 were much considered in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266 and *Western Pacific California Railroad Co.* v. *Southern Pacific Company*, 284 U. S. 47.

In the first of these causes a railroad sought to prevent another from building an extension. The meaning of the term "party in interest" was not discussed. But the opinion asserts that by the Transportation Act of 1920, "Congress undertook to develop and maintain for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers

is a matter of national concern; that the property employed must be permited to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss."

Also "the prohibition of Paragraph 18 is absolute. If the proposed track is an extension and no certificate has been obtained, the party in interest opposing construction is entitled as of right to an injunction."

In the second cause it was claimed that the Western Pacific was not "a party in interest" within the statute. The Circuit Court of Appeals accepted that view; we concluded otherwise but did not undertake to announce an inclusive and exclusive definition of the term. The circumstances disclosed a special interest in that complainant with probability of direct loss from what the defendant—not another—proposed to do. The portion of the opinion, presently specially important, follows—

"If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See *Massachusetts v. Mellon*, 262 U. S. 447, 488. It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation."

The Transportation Act, 1920, was designed to protect the public against action which might endanger its interest. In order to aid that general purpose, Paragraph 20, Section 402, provides that suit for an injunction may be instituted by the United States, the Commission (I. C. C.), any Commission or Regulative Body of the state or states affected, or any "party in interest." Such a suit cannot be instituted by an individual unless he "possesses something more than a common concern for obedience to law." The general or

common interest finds protection in the permission to sue granted to public authorities. An individual may have some special and peculiar interest which may be directly and materially affected by alleged unlawful action. See *Detroit & M. Ry.* v. *Bowne City, etc., & Co.*, 286 Fed. 540. If such circumstances are shown he may sue; he is then "party in interest" within the meaning of the statute. In the absence of these circumstances he is not such a party.

We cannot think Congress supposed that the development and maintenance of an adequate railway system would be aided by permitting any person engaged in business within or adjacent to a public market to demand an injuction against a carrier seeking only to serve a competing market by means of an extension not authorized by the Interstate Commerce Commission.

The right to sue under the statute is individual. Petitioners are not helped by uniting.

The Circuit Court of Appeals after reviewing all the facts reached the conclusion that the welfare of petitioners could only be indirectly and consequentially affected by the proposed extension; that their interest in the transportation situation "is in the effect which changes in it may have upon the market where they do business and upon rival markets now or hereafter established in the territory which the plaintiff served." It held this was not enough. We agree. A mere extension to the plant of a competitor which in no other way affects the complaining parties in no proper sense brings about a material change in the transportation system directly affecting their peculiar interest which they have the right to prevent by suit.

The challenged judgment must be affirmed.

Kansas City, Mo. v. *L. Singer & Sons et al.*

No. 35.

The City of Kansas City, Missouri, sought to intervene in No. 34. The District Court denied its motion. The Circuit Court of Appeals affirmed. In view of what we have decided in No. 34 this denial necessarily must be affirmed.

SUPREME COURT OF THE UNITED STATES.

Nos. 34 and 35.—October Term, 1940.

34 L. Singer & Sons et al., Petitioners, *vs.* Union Pacific Railroad Company.

35 Kansas City, Missouri, Petitioner, *vs.* L. Singer & Sons et al.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 16, 1940.]

Mr. Justice Frankfurter, ~~concurring~~.

I quite agree with my Brother Stone that unfair loss may be cast upon a community by the unjustified extension of a railroad line, and that such loss is one consequence of the evils of unregulated railroad building which the Transportation Act was intended to check. But our immediate problem is to determine how a community can challenge such a proposed improper extension. Can a city, in other words, come into a Federal Court and urge its special relation to an alleged violation of § 1(18-22), of the Transportation Act, 1920, 41 Stat. 456, 477, 49 U. S. C. § 1(18-22)? The answer, of course, depends on the scheme of enforcement that Congress has devised for the Act. After making administrative provisions for securing a certificate from the Interstate Commerce Commission as a prerequisite to the construction of an "extension", the Act subjects any construction in violation of its licensing system to an injunction "at the suit of the United States, the Commission, any commission or regulating body of the State or States affected or any party in interest". § 1(20).

A city deeming itself adversely affected by a proposed illegal extension would naturally turn to its state commission to assert its interests. If, for any reason, the state agency does not employ its power under § 1(20) on behalf of the city's claims, the latter can invoke the law-enforcing authority of the Interstate Commerce Commission and also enlist the power of the Attorney General to initiate

litigation. It is reading § 1(20) without illumination of the scheme and purposes of the Transportation Act to expand the categories of public agencies explicitly named by Congress for enforcing § 1(18) by including a city as a "party in interest". To do so would disregard recognition of a state utility commission as the special repository of all the interests of a state in this particular field, and of the Interstate Commerce Commission as the national organ for enforcing the body of interstate commerce acts. Clearly, therefore, Kansas City can not be deemed a "party in interest" for the litigious purposes of that phrase in § 1(20).

But it would indeed be strange to find that while the city was not given power to resort to a court, a private and more limited sufferer from the same economic threat may have such legal standing. Such a paradox exposes the appropriate scope of "party in interest" in § 1(20). The guiding considerations in the application of that section are to be found in the reach of the functions of the Interstate Commerce Commission and of its state analogues. They are relied on for the enforcement of railroad legislation neither grudgingly nor with scepticism. In these agencies are lodged the resources for compounding the manifold ingredients of "the public interest". To entrust the vindication of this public interest to a private litigant professing a special stake in the public interest is to impinge on the responsibility of the public authorities designated by Congress. If there be insufficient assurance that unlawful railroad construction will be resisted by a state commission representing all the interests of a state that are affected, the Interstate Commerce Commission may be moved to enjoin illegality.

Who then is a "party in interest"? As a part of the very system through which the national policy is to be achieved, a railroad has been deemed by this Court a "party in interest" to effectuate the railroad policy introduced by the licensing system of the Transportation Act. *Texas & Pac. Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266, 277; *Western Pacific* v. *Southern Pac. Co.*, 284 U. S. 47. And one who in a proceeding initiated before the Interstate Commerce Commission has been treated by it as a party to the litigation, cf. *Los Angeles Passenger Terminal*, 100 I. C. C. 421; 142 I. C. C. 489; *Atchison Ry.* v. *Railroad Comm.*, 283 U. S. 380, 393-94, may perhaps be deemed a "party in interest" in the further pursuit of claims before a court after adverse action by the

Commission. Compare *I. C. C.* v. *Oregon-Washington R. R.*, 288 U. S. 14, and *Commission* v. *Sanders Radio Station*, 309 U. S. 470. But to allow any private interest to thresh out the complicated questions that arise out of § 1(18-22)[1]—as, for instance, whether a proposed construction is an "extension" or a "spur", compare *Texas & Pac. Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266—is to invite dislocation of the scheme which Congress has devised for the expert conduct of the litigation of such issues.[2] It also would put upon the district courts the task of drawing fine lines in determining when a private claim is so special that it may be set apart from the general public interest and give the claimant power to litigate a public controversy. These inquiries are so harassing and unprofitable as to be avoided, unless Congress has explicitly cast the duty upon the courts. Against any such implication, in the absence of rather plain language, the whole course of federal railroad legislation and the relation of the Interstate Commerce Commission to it admonishes. The interests of merely private concerns are amply protected even though they must be channelled through the Attorney General or the Interstate Commerce Commission or a state commission.

Therefore, the court below made proper dispositions of these cases.

Mr. Justice ROBERTS, Mr. Justice BLACK, Mr. Justice DOUGLAS, and Mr. Justice MURPHY having concurred in the Court's opinion, also join in these views.

[1] The fact that, in order to raise the bare legal question of petitioner's right to sue, the illegality of the proposed extension was conceded by the pleadings, does not touch the force of the argument.

[2] With reference to the present circumstances themselves, the Attorney General, at the request of the Interstate Commerce Commission, has chosen a different remedy to protect the public interest. See United States *v.* Union Pacific R. R., 32 F. Supp. 917.

SUPREME COURT OF THE UNITED STATES.

Nos. 34, 35.—October Term, 1940.

L. Singer & Sons et al., Petitioners, 34 *vs.* Union Pacific Railroad Company. Kansas City, Missouri, Petitioner, 35 *vs.* L. Singer & Sons et al.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 16, 1940.]

Mr. Justice Stone.

I think that the complainants, petitioners in No. 34, are proper parties to maintain this suit, that the decree should be reversed and, on the remand, the petition of Kansas City for intervention should be considered in light of that conclusion and of §§ 212 and 213 of the Judicial Code, 28 U. S. C. §45a and of Rule 24 of the Rules of Civil Procedure.

On the pleadings it stands conceded that the proposed extension of respondent's line is unauthorized and unlawful, and the sole question we have to decide is whether the interests of petitioners in maintaining this suit, as disclosed by their pleadings, satisfies the requirement of the statute which authorizes it to be brought by "any party in interest".

Section 1(18) of the Transportation Act of 1920, 41 Stat. 474, 477, 49 U. S. C. § 1(18), forbids the extension of its line by a railroad without a certificate of the Interstate Commerce Commission that "the present or future public convenience and necessity require or will require the construction of the extension". Similarly it prohibits the abandonment of any portion of a line of railroad without a like certificate permitting the abandonment. Section 1(19) requires the Commission to give notice of application for a certificate to the governor of the state in which the proposed extension is to be constructed and to publish the notice in each county through which the line of railroad is constructed or operated. By § 1(20)

the Commission is authorized to attach to its certificate "such conditions as in its judgment the public ~~interest and~~ convenience may require", and authorizes any court of competent jurisdiction to enjoin the prohibited construction or abandonment "at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in interest; . . ." By § 1(22) spur, industrial, side tracks and the like are excluded from the authority of the Commission and the railroad may build them without applying for a certificate.

The interest of petitioners in maintaining the suit as shown by the pleadings is derived from the injury to the public which, it is specifically alleged, will result from the proposed extension through the injury to the community in Kansas City, Missouri, and vicinity, of which community petitioners are a part and in which they are property owners, and the consequent injury alleged to affect them individually. The public injury, it is alleged, will be caused by (a) the loss or serious impairment in utility of the Kansas City public produce market and the destruction of serious diminution of values of property and business and of financial investments in and about the market, which will be brought about by the extension, through the creation of a rival market and the diversion of traffic to it at a point in Kansas City, Kansas, far removed from the center of population of Kansas City, Missouri, and to the inconvenience of the great majority of the citizens of both cities who are served by the existing market, which is adequate to the needs of the community; (b) by the unnecessary duplication of railroad facilities in the Kansas City district at large cost, with wasteful and needless expenditures by respondent and no increase in freight to be handled; and (c) by the diversion of traffic to respondent railroad from other railroads and destructive competition between the railroads operating in the vicinity.

Special injury is shown to complainants (petitioners in Nos. 34) by the allegations that they are owners of business property and investments in the existing market area and vicinity, and that their property will be reduced in value in consequence of the diversion of traffic to the rival market. The petitioner, Kansas City, Missouri, in intervention, in No. 35, alleges the like injury to the public which it represents and sets up specifically the threatened loss in value and utility of a large public market structure which it is now building at great cost, and the threatened loss to it of taxes through diminution in property values in the city.

The statute does not define the "parties in interest" whom it permits to sue to restrain an unauthorized extension. It cannot be assumed that the phrase is meaningless or that the statute should be read as though the words were omitted. Obviously the parties intended must have, as do petitioners, an interest in the outcome of the litigation other than the "common concern for obedience to law". See *Massachusetts* v. *Mellon*, 262 U. S. 447, 488. And as the language of the statute plainly indicates, and as we have held, they may be, as are petitioners, others than the public bodies named in the statute as appropriate plaintiffs. *Atchison Ry.* v. *Railroad Commission*, 283 U. S. 380, 393, 394. And they may maintain the suit although the injury which they allege is not strictly an actionable wrong independently of the paragraphs in question. *Western Pacific R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47.

The statute draws no distinction between direct and indirect injury as the test of plaintiff's interest. Nor is any reason advanced for saying that his interest is more significant because the injury which he suffers is labeled "direct" rather than "indirect." In any case that suffered by petitioners does not seem to be any the less direct than that which an extension may inflict upon a competing railroad which admittedly may sue to enjoin it. *Western Pacific California R. Co.* v. *Southern Pacific Co., supra;* cf. *Glaiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382. If the statute imposes any requirements other than those indicated by the phrase "party in interest", they must be implied from the purposes of the statute, its context, and from the reasons for permitting others than the public bodies named in it to bring the suit. Cf. *N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 24. On the other hand if maintenance of the present suit by petitioners is consistent with those purposes and aids them and is in harmony with the reasons for allowing any party in interest to sue, the conclusion would seem inescapable that petitioners are proper plaintiffs.

It is not denied that the statutory language and the legislative history of the paragraphs in question require consideration by the Commission of the interests of cities, towns and communities which are adversely affected by a proposed extension of a line of railroad, in order to determine whether "public convenience and necessity" require the extension. The phrase "public convenience and necessity" has long been used to signify the final result of the balancing of the consequences which flow from the proposed

action to all those matters of public concern which are affected by it. Cf. *Chesapeake & O. Ry. Co.* v. *United States,* 283 U. S. 35, 42; *United States* v. *Lowden,* 308 U. S. 225. And we have held that in the administration of the cognate provision relating to abandonment of railroad lines the Commission must consider as a part of the public convenience and necessity the interests of local communities affected by the proposed abandonment. *Colorado* v. *United States,* 271 U. S. 153, 168. A community may suffer injury through the loss of railroad service and diversion of traffic resulting from the construction and operation of a railroad extension without any compensating public advantage which is comparable in kind and amount with injury sustained by the abandonment of a line of railroad. One as well as the other should receive the consideration of the Commission in determining whether it should grant or withhold a certificate. Such appears to be its settled practice on applications for a certificate authorizing extension.[1]

It is plain that the purpose of the statute is the protection of the public interest and that in the administration of its provisions by the Commission public interest is of paramount concern. That interest is primarily that railroad extensions, as the statute provides, shall not be built or operated without receiving the approval of the Commission, and that the Commission shall grant its permission only if the public convenience and necessity so require.

In determining who may bring the suit to restrain the proposed construction as provided by § 1(20), it is significant that the suit is

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[1] See Aroostook Valley R. R., Construction, 105 I. C. C. 643; Minnesota W. R. R. Co., Construction, 111 I. C. C. 377; Northern Oklahoma Rys., 111 I. C. C. 765; Construction of Piedmont & W Ry., 138 I. C. C. 363; Western Pacific Caledonia R. Co., 162 I. C. C. 5 And in balancing the public conveniences and necessities involved, that is to say the public interest in an adequate transportation system and the public interest in protecting local communities from undue injury from extensions of relatively small transportation importance, the Commission has sometimes found the inquiry to existing community interests persuasive ground for refusing the certificate. Construction by Aroostook Valley R. R., *supra;* Construction by Minnesota W. R. R. Co., *supra.*

The broad scope of the Commission's inquiry is evidenced by the questionnaire which applicants for an extension must answer. Among the data required is the nature of the population, the territory, the industries involved, the names and character of towns near to but not served by the extension. See *In the matter of Applications under Paragraphs (18) and (21), Inclusive, Section 1, of the Interstate Commerce Act for Certificates of Public Convenience and Necessity for the Construction or Extension of Lines of Railroad,* January 22, 1924. III-A Sharfman, The Interstate Commerce Commission, 333-335, 351.

brought to restrain an act which the statute declares unlawful, the construction of an extension without the certificate of the Commission, § 1(18), and that the functio of the court is not that of the Commission in granting or withholding a certificate. The only issue which can be litigated in such a suit, brought by a proper plaintiff, is whether in fact the proposed construction is of a spur or sidetrack, the only new trackage which a railroad may lawfully build without recourse to the Commission. It is an issue which is by paragraphs (18) and (22) of § 1 made a judicial, not an administrative question and involves no more complexities of litigation than many other cases which courts are called on daily to decide. In any case the issue is one which Congress directed to be litigated in a suit brought under § 1(20), and its complexity is unaffected by the particular plaintiff who brings the suit.

If the proposed construction is an extension the injunction must issue as of right, but its only effect is to compel the railroad before proceeding further to apply to the Commission for a certificate of public convenience and necessity which is the public purpose of the Act. *Texas & Pacific Ry.* v. *Gulf, etc. Ry.*, 270 U. S. 266, 273. The court is thus called on to decide no administrative issue which must be submitted to the Commission in advance of suit, and any decree which it may render involves no embarrassment to the Commission or otherwise in the administration of the Act. While the Commission itself may bring the suit, it is under no statutory duty to do so and its only other authority in the premises is to grant or withhold the certificate when applied for. One injured by an unauthorized extension and opposed to its construction, whether a state commission, a competing railroad or any other injured party, is not authorized to initiate any proceeding before the Commission and its only protection as of right from the consequences of the threatened public wrong is that afforded by suit authorized by § 1(20). See *Texas & Pacific Ry.* v. *Gulf, etc. Ry., supra*, 272-274.

In considering the scope of the application of the statute this Court has recognized that the public interest which the Commission is to protect includes the public interest in the maintenance of an adequate transportation system and that a railroad whose welfare, although not its legal right, is adversely affected by an unauthorized and therefore unlawful extension of the line of another is a "party in interest" entitled to maintain suit to enjoin the extension. *Western Pacific California R. Co.* v. *Southern Pacific Co.*,

supra; cf. *Claiborne-Annapolis Ferry Co.* v. *United States, supra.* And it has held that one other than a carrier (a municipality), who has "a proper interest in the subject matter", may institute a proceeding before the Interstate Commerce Commission under § 1, paragraphs 18 to 22, to obtain a certificate of public convenience, so as to enable a railroad to build an extension to a new station which a state commission has ordered it to build. *Atchison Ry.* v. *Railroad Commission, supra,* 393, 394. Compare *Detroit & M. Ry.* v. *Boyne City etc., & Co.,* 286 Fed. 540.

But it has never held, unless it has done so now, that the public concern in protecting large communities from destruction of their business and financial interests by diversion of traffic to rival communities by railroad extensions, is not included in that public convenience and necessity which the Commission must consider in granting or withholding a certificate; or that one not a railroad who is a member of a community adversely affected and whose own business or property interests are so adversely affected is not a "party in interest" within the meaning of the statute.

If the statute permits some protection through commission action of the public interest in the preservation of communities adversely affected by the construction of railroad extensions, no plausible reason has been advanced for saying that an individual member of such a community whose property or financial interests are adversely affected by the proposed unauthorized extension, and who would be a proper party to the proceeding before the Commission on application for a certificate,[2] is not a party in interest, entitled to bring suit quite as much as a competing railroad whose property interes.. are likewise affected. On the contrary, petitioners have a special and peculiar interest in preventing the unlawful extension and in securing, before the extension is built, such consideration of

[2] It is settled policy of the Interstate Commerce Act and related statutes to permit shippers, cities, commercial organizations and other interested parties to participate in proceedings before the Commission and in those before the courts where the application of the statute is involved. § 9, 24 Stat. 382, 49 U. S. C. § 9 permits any person "claiming to be damaged" by a carrier to make complaint to the Commission or to bring suit in a district court. Communities, shippers and associations may make complaint to the Commission under § 13(1), 49 U. S. C. § 13(1), 24 Stat. 383 as amended, 36 Stat. 550. See, United States *v.* Merchants and Manufacturers' Traffic Association, 242 U. S. 178. § 42 provides that in actions to stop rebates and concessions "all persons interested in or affected by the rate or regulation or practice" may be made parties. §§ 212 and 213 of the Judicial Code, 28 U. S. C. A. § 45a provides that "communities, associations, corporations, firms and individuals who are interested in the controversy or question" before the Commission or in any suit which may be brought under the Act may intervene.

the community interest as the Commission gives, and which can be insured only by resort to the suit authorized by § 1(20).

True, the statute is concerned with the protection of the public interest but in order that the public interest might not suffer, and that private injury might not be inflicted through a public wrong, the construction of an unlawful extension, Congress did not restrict the authority to bring suit to public agencies—the United States, the Commission or state commissions. Congress by providing that applications for certificates of convenience need not be made for local spur or side tracks, recognized that such constructions are too trivial to require a proceeding before the Commission. Instead it gave authority to bring the suit to private parties in interest, who because of the injury especially inflicted upon them through the adverse effect of the unlawful extension on the public, have a peculiar incentive to protect the public interest with which the statute is concerned, see *Saunders* v. *Federal Communications Comm'n.*, 309 U. S. 470, 477, and who by restraining an unauthorized "extension" insure the expert consideration by the Commission in the situation in which Congress required it.

Just as Congress gave authority to a railroad to sue to enjoin an unauthorized extension by its competitor in order to effect the railroad policy of the Act, it gave like authority to complainants to effect its public policy with respect to a community injuriously affected by an unlawful railroad extension. The statute gives no warrant for saying that the one may bring suit but that the other can only ask some public body to bring it and neither interferes with the functions which the Commission is authorized to perform and which, as we have seen, are distinct from those assigned to the court by § 1(20).

Maintenance of the suit by complainants is thus within the fair meaning of the words of the statute. It aids rather than obstructs the administration of the Act; it effectuates the public policy of the Act and is within the reason for permitting others than public agencies to bring the suit. They are "parties in interest" to which the statute refers.

Since the suit was properly brought the district court should entertain and decide the petition of Kansas City for intervention in the light of 28 U. S. C. § 45a and Rule 24 of the Rules of Civil Procedure.

The CHIEF Justice and Mr. Justice REED concur in this opinion.